82 - 2136



No.

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1982

FREZZO BROTHERS, INC.
GUIDO FREZZO and JAMES L. FREZZO,
*Petitioners*

*v.*

UNITED STATES OF AMERICA,
*Respondent*

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit.

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Where a Section 2255 petitioner shows that he was ineffectively represented at trial because his counsel did not present evidence of a defense that should have been submitted to the jury, may the habeas court resolve the issue against him by constituting itself the factfinder and rendering a verdict against such petitioner on conflicting evidence under circumstances in which the basis for the adverse verdict was never litigated at trial?

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IN THE
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FREZZO BROTHERS, INC.,
GUIDO FREZZO and JAMES L. FREZZO,
*Petitioners*

*v.*

UNITED STATES OF AMERICA,
*Respondent*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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Petitioners, Frezzo Brothers, Inc., Guido Frezzo and James L. Frezzo, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which affirmed their judgment of conviction entered upon a jury verdict of guilt.

## STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

Petitioners, Frezzo Brothers, Inc., Guido Frezzo and James L. Frezzo, seek a Writ of Certiorari to review the judgment (App. F)* rendered by the United States Court of Appeals for the Third Circuit on March 29, 1983. The judgment affirmed petitioners' criminal convictions entered in the United States District Court for the Eastern District of Pennsylvania following a jury trial (App. A).

By Order dated May 20, 1983, Mr. Justice Brennan extended the time to file a Petition for Writ of Certiorari to and including June 27, 1983 (App. G).

The Supreme Court has jurisdiction to review the judgment below by Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

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* App. refers to the appendix annexed to this petition in a separate booklet.

## PERTINENT STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

The following constitutional provision set forth in the Appendix is pertinent: the Fifth Amendment to the United States Constitution. (App. H)

The following statutes set forth in the Appendix are pertinent: 33 U.S.C. §1311(a) and §1319(c). (App. I)

The following regulation set forth in the Appendix is pertinent: 40 C.F.R. §125.4(i). (App. J)

## STATEMENT OF THE CASE

A. *Procedural History*

Petitioners were convicted of negligent and willful discharge of pollutants into navigable waters in violation of the permit requirements of Section 402(a) of the Water Pollution Control Act Amendments of 1972. 33 U.S.C. Section 1311(a) and Section 1319(c). 461 F.Supp. 266 (E.D. Pa. 1978) (App. A), *aff'd*, 602 F.2d 1123 (1979) (App. B).

Petitioners' new counsel raised for the first time on petition for rehearing in the Court of Appeals the agricultural exclusion of 40 C.F.R. Section 125.4(i). This was denied. The District Court there dismissed their post-conviction petitions without a hearing. Its opinion is reported at 491 F.Supp. 1339 (E.D. Pa. 1980) (App. C). The Court of Appeals reversed, holding that if petitioners' discharges were agricultural pollution then petitioners needed no Section 402 permit. 642 F.2d 59 (3rd Cir. 1981) (App. D). The Court of Appeals remanded for the District Court to hear evidence and decide this issue.

The District Court took testimony and found against petitioners. 546 F.Supp. 713 (E.D. Pa. 1982) (App. E). The Court of Appeals affirmed per curiam. No. 82-1494 (March 8, 1983) (3rd Cir. 1983) (App. F).

B. *Concise Statement of Facts*

At the time of petitioners' alleged violations in 1977 and 1978, there were in effect EPA regulations which provided (40 C.F.R. Section 125.4(i)) that discharge of surface water into navigable streams from agricultural activities did not constitute "point source" discharge and therefore did not require a Section 402 permit. This "agricultural activities" defense was not raised at trial or on direct appeal.

Petitioners' new counsel raised for the first time on petition for rehearing in the Court of Appeals the agricultural exclusion of 40 C.F.R. Section 125.4 (i). This petition was denied and petitioners then filed a petition

to vacate their sentences under 28 U.S.C. Section 2255 as to the individual defendants and a petition for coram nobis on behalf of the petitioner corporation. The Government moved to dismiss the post-trial petitions arguing that even if petitioners' activities were agricultural within the meaning of the cited regulation, they were not entitled to habeas relief. The District Court agreed and dismissed the petition. (App. C)

The Court of Appeals reversed, stating: "[w]e hold that, if petitioners' discharges were agricultural pollution, then petitioners needed no Section 402 permit under the language in the former regulation." 642 F.2d at 63 (App. D).

The Court of Appeals also held that whether the pollution was agricultural was an issue of fact and remanded for the District Court to hear evidence and decide this factual issue. On remand, the District Court heard evidence, including two unquestioned experts on the subject produced by petitioners who stated that the process known as mushroom compost production was agricultural in its materials, its processes and its purposes as well as in its history and its historic legal recognition by state and federal agencies concerned. The District Court held that petitioners' mushroom composting activity was manufacturing rather than agricultural activity. Having so determined, the District Court, addressing the merits of the Section 2255 — coram nobis petitions, held that petitioners' trial counsel was not ineffective in not having raised the agricultural issue because the petitioners' activities were truly manufacturing.

The District Court relied in large part on the fact that no objection was made at trial to its definition (in the charge) of pollutants as including agricultural waste, overlooking the fact that at trial all parties agreed that they were dealing with agriculture.

Petitioners appealed, arguing that it does not cure the failure to present their defense to the jury for the habeas court to find on conflicting evidence that the defense lacked merit factually. The Court of Appeals affirmed per curiam. (App. F)

## REASONS FOR GRANTING THE WRIT

This Court's Rule 17 considerations here applicable are that the District Court and Court of Appeals have so far departed from the usual course of judicial proceedings as to call for an exercise of this Court's supervisory power and have decided a previously undecided federal criminal procedural question in a way that conflicts with decisions of this Court in closely analogous situations.

We see the action of the Court below as at variance with the rule of *Dunn vs. United States*, 442 U.S. 100, 106 (1979) wherein this Court reversed the Tenth Circuit's affirmance of a perjury conviction on a charge "that was neither alleged in an indictment nor presented to a jury at trial." As applied to affirmance on direct appeal, this rule is a fundamental to due process jurisprudence. *Cf. Rewis vs. United States*, 401 U.S. 808 (1971); *Chiarella vs. United States*, 445 U.S. 222 (1980).

Petitioners believe and have consistently argued to the courts below that the same rule is applicable in this Section 2255 review of a criminal conviction. So viewed, the record presents a question which this Court has not squarely addressed but which is closely analogous to the direct appeal problem. The Third Circuit decision departs from the doctrine established in that context.

In Section 2255 proceedings, persons convicted in federal courts ask the habeas court to review the earlier record in a constitutional frame. Section 2255 is not designed to provide a vehicle for retrial of trial issues, whether or not they were earlier presented, and such proceedings certainly are not designed to permit judging the fairness of an earlier criminal proceeding by trial to a court of a previously unlitigated issue which petitioners contend should have been raised by their counsel and submitted to the jury in their trial.

Concededly, it is a Section 2255 petitioners' burden to show he has a jury issue. However, a petitioner need not prove his defense to a habeas judge.

These petitioners contended they were deprived of a chance to submit the agricultural defense to the jury by

the ineffectiveness of their counsel. In the post-conviction proceedings, the courts have actually tried the agricultural issue and found against petitioners on it and therefore held that the issue need not have been presented to the jury in the first place. The judgement against petitioners results from a finding of fact based upon conflicting evidence first submitted in the remand hearing before the District Court.

Such conduct of a Section 2255 proceeding totally distorts the nature of such a proceeding. These petitioners undertook the burden of showing a serious error *at their trial* that worked to their actual and substantial disadvantage infecting that trial with error of constitutional dimension. *Cf. United States vs. Frady*, 456 U.S. 152 (1982). The error lay in their counsel's failure to present what appears to have been their only viable defense, i.e., that their activity was agricultural in nature within the EPA regulations excluding such activity from the permit program.

This record clearly presents the issue petitioners seek to have reviewed by this Court; namely, whether a habeas court under Section 2255 may deny relief by a factual finding of a jury issue never presented at trial.

## ARGUMENT

### PETITIONERS' RIGHTS TO DUE PROCESS OF LAW WERE VIOLATED IN THE SECTION 2255 POST-CONVICTION PROCEEDINGS BY THE SUSTAINING OF PETITIONERS' CONVICTIONS ON A BASIS OTHER THAN THE BASIS ON WHICH THE JURY RENDERED ITS VERDICT.

Fundamental precepts of due process of law teach that a conviction may not be affirmed on a basis other than that on which the jury rendered its verdict. *Chiarella vs. United States*, 445 U.S. 222, 236 (1980); *Dunn vs. United States*, 442 U.S. 100, 106 (1979); *Rewis v. United States*, 401 U.S. 808, 814 (1971).

Here, at trial, the Government argued that petitioners' pollution was agricultural waste. At the Government's request, the trial judge instructed the jury that the case involved agricultural waste. The district judge instructed the jury that the term "pollutant" includes:

> [d]redged soil, solid waste, incinerator residue, sewerage garbage, sewerage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and *agricultural waste* discharged into the water. (emphasis added)

The district judge then narrowed it down for the jury stating: "I also want to call your attention to the fact that the pollutant definition includes the term agricultural waste. That is one of the pollutants specifically mentioned in the definition of pollutant."

In arguing the Government's case to the jury, the Assistant United States Attorney predicted to the jury that the Court would read them the statutory definition of pollutant, adding: "[t]hat it can be biological materials, that it can be agricultural waste. And we think, ladies and gentlemen, that there is ample evidence that

compost material is biological material; that it's sewage; that it's agricultural waste." Of all the types of pollutants defined by the Court, the Government chose to argue agricultural waste.

Having tried petitioners as agricultural polluters, the Government in Section 2255 proceedings argued that they were manufacturers when new defense counsel discovered the agricultural exclusion. Thus, the Government sought to have the conviction affirmed on a theory not presented to the jury.

This Court has consistently declined to permit convictions to be sustained on a basis or theory other than the one on which the jury rendered its verdict. In *Chiarella vs. United States, supra,* petitioner was convicted because of his failure to disclose material, nonpublic information to sellers from whom he bought the stock of target corporations. In seeking to support the petitioner's conviction, the Government argued that the petitioner breached a duty to the acquiring corporation, as well. This Court held:

> [t]he jury was not instructed on the nature or elements of a duty owed by petitioner to anyone other than the sellers. Because we cannot affirm a criminal conviction on the basis of a theory not presented to the jury, we will not speculate upon whether such a duty exists, whether it has been breached, or whether such a breach constitutes a violation of Section 10 (b). (citations omitted) *Chiarella,* 445 U.S. at 236-237.

In *Dunn vs. United States, supra,* the petitioner had been convicted under 18 U.S.C. Section 1623 for making a false declaration "in a proceeding ancillary to any court or grand jury" based upon a statement under oath made in the office of a private attorney. The Tenth Circuit affirmed petitioner's conviction although it agreed with the petitioner that the interview in a lawyer's office was not within Section 1623. The Court of Appeals held instead that a hearing in court a month after the disposition was within the statute. This Court reversed, hold-

ing: "[t]o uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial, offends the most basic notions of due process." *Dunn*, 422 U.S. at 106.

In *Rewis vs. United States, supra*, petitioners were convicted under 18 U.S.C. Section 1952, which prohibits interstate travel in furtherance of certain criminal activity, under jury instructions that petitioners violated the Travel Act if they traveled interstate for the purpose of gambling. On appeal, the Government offered an alternative construction of the Travel Act — that the act of encouragement of interstate patronage violates the statute. This Court held that "the Government's proposed interpretation of the Travel Act cannot be employed to uphold these convictions . . . . because it is not the interpretation of Section 1952 under which petitioners were convicted." *Rewis*, 401 U.S. at 814.

This case is indistinguishable in principle from those in which this Court has reversed convictions that had been affirmed on direct appeal on theories not presented to the jury.

In addition, to uphold a conviction on a charge not presented to a jury offends "a defendant's right to be heard on the specific charges of which he is accused." *Dunn*, 442 U.S. at 106 (citations omitted).

The Court of Appeals has here held that whether the pollution was agricultural was an issue of fact and remanded for the District Court to hear evidence and decide this factual issue. In doing so, the Court of Appeals recognized that it could not determine issues of fact. It erred in permitting a district judge to do so. The constitutional guarantee of factual findings on a contested element of the offense or of a defense as the exclusive province of a jury is elemental. Findings of fact have never been held to be appropriately made in such a post-trial setting. *Cf. Dunn, supra; Eaton vs. Tulsa*, 415 U.S. 697, 698-99 (1974); *Garner vs. Louisiana*, 368 U.S. 157, 163-64 (1961); *Cole vs. Arkansas*, 333 U.S. 196, 201 (1948); *De Jonge vs. Oregon*, 299 U.S. 353, 362 (1937).

Petitioners' argument that they had been deprived, by ineffective counsel, of the opportunity to present to the jury at their trial the only defense available to them was inappropriately met by the District Court with the response that it had found as a fact that "the Frezzo Brothers, in connection with their production of compost, are engaging in a manufacturing activity and not an agricultural operation." 546 F.Supp. at 724. From this factual finding, the District Court drew the conclusions (1) that the agricultural activity exclusion of the EPA regulations did not apply to petitioners and (2) therefore they were not ineffectively represented at trial by their former counsel who did not raise this defense and (3) they were not prejudiced because the defense was without merit. All of these conclusions were said to follow from the factual finding on conflicting evidence presented only in the Section 2255 remand hearing and never presented at trial.

The District Court recognized that petitioners' contention was not quite so simple as agricultural *vel non*. The District Court observed: "[d]efendants also contend they will be prejudiced if this court finds that compost making is not an agricultural activity on the ground that this case was tried to the jury on the theory that the Frezzo Brothers' operation produces agricultural waste." 546 F.Supp. at 725.

The Court then digressed from the point, stating that no objection was made at trial to its definition (in the charge) of pollutants as including agricultural waste. In fact, all parties at trial were satisfied to regard petitioners' activities as agricultural until it appeared that label might exculpape them. Agriculture was not a contested issue at trial. The habeas judge entirely ignored the point that it does not remedy the failure to present their defense to the jury for the Court to become a jury and find on conflicting evidence in a Section 2255 hearing that the defense lacked merit factually. Petitioners' position was and is that this was a jury issue.

The result of the Third Circuit's approval of the District Court decision in this case is to convert post-conviction proceedings into a thirteenth juror type of review in which a conviction may be upheld on a basis never litigated before the jury.

While review of criminal convictions in Section 2255 and coram nobis proceedings is substantially narrower than on direct appeal, *United States vs. Frady, supra*, the error alleged in this proceeding is reviewable in both types of proceedings. Both on direct appeal (if the record suffices) and on Section 2255 proceedings later, where a criminal defendant has been deprived of his day in court by counsel's failure to investigate, research and assert his only viable defense, which presents at least a colorable jury issue, the reviewing court cannot solve the problem presented by constituting itself the jury, hearing conflicting testimony and deciding the jury issue against the petitioner. This "thirteenth juror" method of review is improper in Section 2255 proceedings and effects the same deprivation of due process as does affirmance on direct appeal upon a ground not submitted to the jury. *Cf. Chiarella, supra; Dunn, supra; Rewis, supra.*

There are many factual determinations to be made in §2255 proceedings. But they are factual determinations subsidiary to deciding whether the earlier trial proceedings conformed to the Constitution and laws of the United States. They will not be jury issues that were not presented to the jury. Petitioners submit that the question we have described warrants this Court's attention as a supervisory matter and is one affecting a basic issue of federal criminal procedure. Petitioners likewise believe that although not squarely decided by this Court and therefore to some extent a novel issue, nevertheless, the decisions below depart from clearly applicable precedent of this court.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Writ of Certiorari should be granted.

Respectfully Submitted,

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## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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## APPENDIX

## APPENDIX A

UNITED STATES of America
v.
FREZZO BROTHERS, INC., Guido Frezzo, James L. Frezzo.
Crim. No. 78-218.
United States District Court,
E. D. Pennsylvania.
Nov. 22, 1978.

Jury found defendants guilty of willfully or negligently discharging pollutants in violation of the Federal Water Pollution Control Act Amendments of 1972, and defendants moved for judgment of acquittal or a new trial. The District Court, Raymond J. Broderick, J., held that: (1) issuance of an order or institution of a civil suit by the administrator of the Environmental Protection Agency was not prerequisite to filing of criminal prosecution; (2) where defendants never obtained or applied for a permit, any discharge of pollutants by them would be unlawful even though no effluent standards were applicable to them; (3) evidence was sufficient to support finding of guilt, and (4) language in indictment concerning capacity in which individual defendants committed the crime was surplusage and did not need to be proved, and the jury did not have to be so charged.

Motion denied.

**1. Criminal Law 753.2(2)**

Contentions that court erred in denying pretrial motion to dismiss indictment should properly have been raised in a motion for arrest of judgment rather than motion for judgment of acquittal or new trial. Fed. Rules Crim. Proc. rule 34, 18 U.S.C.A.

**2. Navigable Waters 35**

Neither issuance of an order notifying defendants of alleged violations of the Federal Water Pollution Control Act nor institution of a civil suit by administrator of the

Environmental Protection Agency was prerequisite to filing a criminal prosecution for willfully or negligently discharging pollutants in violation of the Act. Federal Water Pollution Control Act, §§ 301(a), 309(c) as amended 33 U.S.C.A. §§ 1311(a), 1319(c).

**3. Navigable Waters 35**

Where defendants never obtained or applied for a permit, any discharge of pollutants by them would be unlawful under the Federal Water Pollution Control Act even though no effluent standards were applicable to them. Federal Water Pollution Control Act, § 301(a) as amended 33 U.S.C.A. § 1311(a).

**4. Navigable Waters 35**

In prosecution for willfully or negligently discharging pollutants in violation of the Federal Water Pollution Control Act Amendments of 1972, evidence was sufficient to support findings that each of defendants discharged pollutants willfully or negligently in connection with runoff from compost used in mushroom growing, that individual defendants were owners or corporate officers of the corporate defenant, and that corporate defendant owned the property and controled the compost operation. Federal Water Pollution Control Act, §§ 301(a), 309(c), 502(6) as amended 33 U.S.C.A. §§ 1311(a), 1319(c), 1362(6).

**5. Criminal Law 494**

In prosecution for willfully or negligently discharging pollutants into stream, testimony of expert provided sufficient actual basis for his opinion that condition or pollution of stream was caused by discharge from defendants' property.

**6. Criminal Law 673(4)**

In prosecution for pollution violations, there was no error in admitting into evidence a certain statement and letter written by one of the defendants subject to instruction that the statement and letter were admissible

only as to that defendant, where, in light of other evidence against the other defendants, the statement and letter were not powerfully incriminating or highly damaging to those defendants or of substantial weight in the Government's case against those defendants.

**7. Criminal Law 793**
**Indictment and information 167**

In prosecution for willfully or negligently discharging pollutants in violation of the Federal Water Pollutants in violation of the Federal Water Pollution Control Act, language concerning the capacity in which individual defendants committed the crime, referring to them as co-owners and officers of defendant corporation, was surplusage and did not need to be proved, and thus there was no error in omitting such language in charge to the jury concerning the individual defendants. Federal Water Pollution Control Act, §§ 301(a), 309(c), 502(5) as amended 33 U.S.C.A. §§ 1311(a), 1319(c), 1362(5).

**8. Searches and Seizures 7(26)**

In prosecution for water pollution violations, defendants lacked standing to object to seizure of samples taken from a channel box which was not located on defendants' property, where there was no evidence that defendants were on the premises at the time of the seizure of the samples, that they had a legitimate proprietary or possessory interest in the premises from which the seizure was made, or that defendants were charged with an offense that includes as an essential element of the offense possession of the samples seized.

Peter F. Vaira, U. S. Atty., Bruce J. Chasan, Asst. U. S. Atty., Eastern District of Pennsylvania, Philadelphia, Pa., Michael P. Carlton, Sp. Atty., Dept. of Justice, Washington, D. C., for plaintiff.

William J. Gallagher, MacElree, Harvey, Gallagher & Kean, Ltd., West Chester, Pa., for defendants.

MEMORANDUM

RAYMOND J. BRODERICK, District Judge.

Defendants, Frezzo Brothers, Inc. (Frezzo Bros.), Guido Frezzo (Guido) and James L. Frezzo (James), were found guilty by a jury on all six counts of an indictment charging them with willfully or negligently discharging pollutants in violation of Sections 301(a) and 309(c) of the Federal Water Pollution Control Act Amendments of 1972 (the Act), 33 U.S.C. §§1311(a), 1319(c) (1970 ed. Supp. IV). Defendants have filed a motion for judgment of acquittal. In the alternative, they have moved for a new trial. Oral argument was had on the motions. For the reasons hereinafter set forth, defendants' motions will be denied.

1. *Motion for Judgment of Acquittal.*

[1] In their motion for judgment of acquittal, defendants make the following contentions:

(A) That the Court erred in denying the defendants' pretrial motion to dismiss the indictment for failure of the Administrator of the Environmental Protection Agency (EPA) either to notify the defendants of alleged violations or to institute a civil suit against them, prior to the institution of criminal proceedings;

(B) That the Court erred in denying the defendants' pretrial motion to dismiss the indictment on the ground that there were no effluent standards applicable to defendants;[1] and

1. The first two contentions of the defendants should properly have been raised in a motion for arrest of judgment. Fed.R.Crim.P. 34; 2 Wright, *Federal Practice and Procedure:* Criminal §§571-574 (1969). We have considered these contentions as if they were raised in such a motion and deny the motion for the reasons stated therein.

(C) That there was insufficient evidence presented to prove that the alleged discharge of pollutants was caused either willfully or negligently by any of the defendants, that any of the defendants discharged the pollutants, that the individual defendants were either owners or corporate officers of Frezzo Bros. at the time of the alleged offenses, and that Frezzo Bros. owned the property in question or operated the holding tank in question at the time of the alleged offenses.

[2] In connection with the defendants' contentions that the issuance of an order or the institution of a civil suit by the Adminstrator is a prerequisite to the filing of a criminal prosecution, we agree with the decision of the court in *United States v. Phelps Dodge Corp.*, 391 F.Supp. 1181 (D.Ariz.1975), which considered and rejected this same contention. In *Phelps Dodge*, the Court concluded that the Adminisrator is "not required to proceed first to effect a correction by civil means before instituting criminal proceedings." *Id.* at 1184. Thus, we find that we correctly denied the defendants' motion to dismiss.

[3] In connection with the defendants' contention that the indictment should have been dismissed because of the lack of effluent standards applicable to the defendants, we read Section 301(a) of the Act as clearly prohibiting the discharge of pollutants without a permit by any person, except as in compliance with certain sections of the Act which the defendants do not contend are applicable. 33 U.S.C. §§1311(a) (1970 ed., Supp. IV). The defendants acknowledge that they neither have a permit nor have they applied for one. In interpreting Section 301(a) of the Act, the Supreme Court has stated that "it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms." *EPA v. State Water Resources Control Board*, 426 U.S. 200, 205, 96 S.Ct. 2022, 2025, 48 L.Ed.2d 578 (1976); *see Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 7, 96 S.Ct. 1938, 48 L.Ed.2d 434 (1976); *Na-*

*tional Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1374, 186 U.S.App.D.C. 147 (1977) ("the legislative history [of the Act] makes clear that Congress intended the . . . permit to be the only means by which a discharger [of pollutants] . . . may escape the total prohibition of §301(a)"); *Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 659 (3d Cir.), *cert, denied*, 430 U.S. 975, 97 S.Ct. 1666, 52 L.Ed.2d 369 (1976) ("all discharges of pollutants must be authorized by a permit . . . "). Because the defendants admit that they never obtained or applied for a permit, any discharge of pollutants by them would be unlawful under Section 301(a), even though no effluent standards are applicable to them. Thus, we correctly denied the defendants' motion to dismiss on the ground that there were no applicable effluent standards.

[4] In connection with defendants' contention that the evidence was insufficient, we find that the evidence produced at trial, viewed in a light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Armocida*, 515 F.2d 29, 46 (3d Cir.), *cert. denied*, 423 U.S. 858, 96 S.Ct. 111, 46 L.Ed.2d 84 (1975), is more than sufficient to support the verdict. We summarize it as follows:

The defendants, Guido and James, are President and Secretary, respectively, of the defendant corporation, Frezzo Bros., a family business formed in the 1950's engaged in the growing of mushrooms and the manufacturing of mushroom compost necessary for growing mushrooms. The primary ingredient of mushroom compost is horse manure. The Frezzo Bros. property (the Frezzo property) is located on the east side of Penn Green Road, near Avondale, Chester County, Pennsylvania. A concrete holding tank constructed on the property in 1971 gathers the water runoff from the compost and, by a system of pumps, recirculates the water runoff back onto the compost. In addition, a storm

water runoff system separate from the compost operations carries rainwater from the property, under Penn Green Road through a pipe which runs for approximately 200 feet from the Frezzo property into an unnamed tributary of the East Branch of the White Clay Creek. The White Clay Creek crosses the Delaware state line and runs into the Christina River, which in turn runs into the Delaware River. On each of the six dates charged in the indictment, runoff from the compost pile made its way into the storm water runoff system and was carried through the pipe into the tributary of the White Clay Creek. A channel box is located about ten feet west of the Penn Green Road, across the street from the Frezzo property. By lifting the cover on this channel box, one can observe the drainage from Frezzo Bros.' storm water runoff system as it flows through the pipe toward the White Clay Creek.

The evidence presented by the Government showed that samples of the discharge from the Frezzo property were taken on each of the six dates charged in the indictment, and many of these samples were introduced as exhibits at trial. The testimony and stipulations of various chemists and physical scientists demonstrated that chemical and bacteriological tests were properly conducted on each of the samples and that the discharges were "sewage", inasmuch as the results of the tests showed that the samples contained higher concentrations of pollution-producing chemicals and bacteria than untreated human sewage. In addition, one physcial scientist testified that the test results clearly indicated that the discharges contained "biological materials" and that the discharges were also "sewage". "Sewage" and "biological materials" are terms specifically included in the Act's definition of "pollutant". 33 U.S.C. §13262(6) (1970 ed. Supp. IV).

The Government introduced as exhibits at trial several photographs which showed not only the layout of the Frezzo property, but also the path that runoff from the compost pile would follow in entering the storm water runoff system, through which it would be carried from the Frezzo property through the channel box into the unnamed tributary of the East Branch of the White Clay Creek. One witness testified that he had actually walked along the path of the pipe from Penn Green Road to the pipe's end at the tributary and that there were no other mushroom manufacturers upgrade of the channel box. He further testified that results of analyses of samples from the channel box and from the White Clay Creek substantiated his conclusion that the pollution in the White Clay Creek came from the Frezzo property. Therefore, his stated opinion was that the pollution of the White Clay Creek was due primarily to the discharge from the Frezzo property. In addition, there was testimony concerning the amount of rainfall in the area and that the holding tank was not large enough to contain normal rainfall.

Testimony was presented by several witnesses that on many occasions, commencing as far back as 1970, the defendants in this case had been investigated, visited and confronted by a number of state and county employees concerning the fact that the stream in question was being polluted by runoff from the compost operation conducted by the defendants on the Frezzo property.

Testimony in connection with the articles of incorporation of Frezzo Bros., which were introduced as an exhibit by the Government, demonstrated that the corporation was incorporated in 1969 under the laws of Pennsylvania and that James and Guido were two of the three original directors. The Government also introduced as an exhibit a deed dated February 2, 1973 which listed Frezzo Bros. as grantor and which contained notarized signatures of Guido as President and James as Secretary. On a visit to the Frezzo property

on November 16, 1976, an environmental specialist with the Pennsylvania Department of Environmental Resources (the DER), upon asking to speak to a responsible official of the company, was directed to James. He questioned James concerning a brown-colored liquid flowing in the White Clay Creek coming from a pipe he had traced to the Frezzo property. A letter dated October 4, 1971 from James to the DER, introduced as an exhibit by the Government, indicated that James knew that the holding tank was inadequate. One witness testified that at a visit to the Frezzo property on January 12, 1978, he was given a tour of the premises by James and Guido, who indicated their control and ownership of the premises, including the holding tank; they also told him that they had constructed the storm runoff system. This witness made an in court identification of both James and Guido. In addition, there was testimony that on May 9, 1978 James made the statement that "we can control our waters 95% of the time."[2] Finally, there was testimony that the Frezzo property was listed at the tax assessor's office in the Chester County Courthouse as belonging to the corporation.

The Government's case was strong, and there can be no doubt that the evidence was sufficient to support the jury's verdict as to each of the defendants and as to each of the six counts of the indictment. The evidence amply supports a finding by the jury that each of the defendants discharged pollutants willfully or negligently, that James and Guido were owners or corporate officers of Frezzo Bros., and that Frezzo Bros. owned the property and controlled the compost operation. We therefore reject the defendant's contention that the evidence pro-

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2. The Court instructed the jury that the contents of the October 4, 1971 letter and this statement should be used as evidence only against James and not against Guido or Frezzo Bros. The defendants challenge the admissibility against Guido and Frezzo Bros. of the letter and this statement. See our discussion at page 271-272 *infra*.

duced at trial was insufficient to support the verdict of the jury.

II. *Motion for a New Trial.*

Defendants claim the following errors in support of their motion for a new trial:

(A) That the Court erred when it failed to strike the opinion offered by Richard Casson to the effect that the condition or pollution of the stream at the Ellicott Avenue Bridge was caused by the discharge from the Frezzo property;

(B) That the Court erred when it overruled the defendants' objections to the statement made by James on May 9, 1978 and to the reading of Government exhibit No. 41;

(C) That the Court erred when it failed to give defendants' point for charge No. 5 that the mere discharge of a pollutant is not a criminal offense;[3]

(D) That the Court erred when it advised the jury that the individual defendants could be found guilty outside their capacity as alleged co-owners and responsible officers of the corporation; and

(E) That the Court erred when it denied the defendants' motion to suppress samples taken from the channel box.

A. *The Opinion of Richard Casson.*

[5] In connection with the defendants' contention that the opinion offered by Mr. Casson that the condition or pollution of the stream of the East Branch of the White Clay Creek at the Ellicott Avenue Bridge was caused by the discharge from the Frezzo property should have been stricken for lack of a factual basis, we find that our ruling at trial was correct. Mr. Casson testified that he had on several occasions observed the flow

3. We note that the defendants' requested point for charge referred to is actually point for charge No. 6, rather than point for charge No. 5: "The mere happening of a discharge is not sufficient to show the discharge was intentional or negligent."

of the discharge from the Frezzo property to the Ellicott Avenue Bridge. In addition, he testified that a comparison of the results of the analyses of samples from the channel box and samples from the White Clay Creek substantiated his conclusion. Thus, we find that there was a sufficient factual basis for Mr. Casson's opinion. *See United States v. R. J. Reynolds Tobacco Co.*, 416 F. Supp. 313 (D.N.J.1976).

B. *Statement and Letter of James.*

[6] The defendants, Guido and Frezzo Bros., contended that the Court erred in admitting into evidence a statement made by James on May 9, 1978 and the contents of a letter written by James to the DER on October 4, 1971, despite the Court's instruction to the jury that the letter and the statement were admissible only as to James. Neither the statement made by James nor the pertinent contents of the letter fall within the *Bruton* rule, as defendants contend. *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).[4] In *Bruton*, the Supreme Court held that the admission of a co-defendant's confession implicating the defendant

4. The May 9, 1978 statement by James, "We can control our waters 95% of the time," and his letter of October 4, 1971, wherein he stated "I planned on an additional tank for water storage. This would help me better contain run-off and rainwater . . . . I am still considering the installation of another holding tank," which letter he signed "James Frezzo, Partner", clearly indicate, in light of other evidence presented in the case, that these statements were made by James in his capacity as co-owner and/or corporate officer of Frezzo Bros. and would probably be admissible against Frezzo Bros. Furthermore, since declarations of one partner in crime are admissible against his confederates where, as here, they were made in furtherance of a joint criminal venture and there is sufficient evidence independent of these statements to indicate the existence of such a venture, such statements probably would have been admissible against Guido and perhaps the corporation. *United States v. Trowery*, 542 F.2d 623, 627 (3d Cir. 1976); *United States v. Pugliese*, 153 F.2d 497, 500 (2d Cir. 1945). In an abundance of caution, however, at the request of the defendants the Court instructed the jury to consider the statements only against James.

was a violation of the defendant's right to cross-examine witnesses against him, even if it was admitted with a cautionary instruction to the jury that the statement was only to be considered as evidence against the co-defendant. But implicit within this ruling was the rationale that the statement represent a "powerfully incriminating extrajudicial statement" which was highly damaging to the defendant and which was of critical, or at least substantial, weight to the Government's case. 391 U.S. at 128, 135, 38, 88, S.Ct. 1620; *United States v. Munford*, 431 F.Supp. 278, 291 (E.D.Pa.1978). In light of the other evidence against defendants Guido and Frezzo Bros., we find that the statements involved here were not powerfully incriminating, highly damaging to these defendants, or of substantial weight to the Government's case against these defendants. Thus, we find that our rulings with respect to the May 9, 1978 statement of James and the letter from James to the DER were correct.

C. *Point for Charge No. 5.*

Defendants' contention (C), that the Court failed to charge the jury that the mere discharge of a pollutant is not a crime, is without merit because the Court in fact specifically charged the jury as follows:

> In connection with the second element, therefore, the burden is on the Government to prove beyond a reasonable doubt that the defendants discharge of the pollutant was done willfully or negligently and the mere discharge of the pollutant, without proof that it was done either willfully or negligently, does not satisfy the Government's burden of proof beyond a reasonable doubt that the discharge was done willfully or negligently.

D. *Charge of Court Concerning Individual Defendants.*

[7] The individual defendants contend that the Court erred in its charge to the jury concerning

them. They point to the indictment which charges that James, "an individual in his capacity as co-owner and Secretary of Frezzo Brothers, Inc." violated Sections 301(a) and 309(c) of the Act and that Guido, "an individual in his capacity as co-owner and President of Frezzo Brothers, Inc." violated Sections 301(a) and 309(c) of the Act, and they claim that the Court erred in omitting this language in its charge to the jury concerning the individual defendants.

The statute creates an offense, the gravamen of which is the willful or negligent discharge of a pollutant by any person without a permit. It does not create a separate offense for such a discharge by a person in his capacity as a co-owner or an officer of a corporation or in any other capacity.[5] In the Court's charge, the jury was instructed that the Government had a burden to prove beyond a reasonable doubt all of the essential elements of the crime as to each defendant.[6] The charge stated that the essential elements of the crime consisted of the willful or negligent discharge of a pollutant without a

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5. The Act defines "person" as follows:

The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body. 33 U.S.C. §1362(5) (1970 ed. Supp. IV).

The Act also provides that for purposes of section 309(c), "the term 'person' shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer." 33 U.S.C. §1319(c) (1970 ed. Supp. IV). The Court charged the jury concerning the meaning of the phrase "responsible corporate officer".

6. The Court charged the jury as follows:

Now, the essential elements that must be found beyond a reasonable doubt before you may find a defendant guilty of violating those sections—in other words, Title 33, Section 1311(a) and 1319(c)—are that on or about the dates alleged in the

permit. Inasmuch as the capacity in which one discharges the pollutant is not an essential element of the crime, the language of the indictment alleging that James and Guido each acted in his capacity as co-owner and/or Secretary and President of Frezzo Bros. goes beyond alleging matters which are essential elements of the crime. Language in an indictment which goes beyond alleging matters which are essential elements of the crime charged in surplusage and need not be proved. *United States v. Greene*, 497 F.2d 1068, 1086 (7th Cir. 1974), *cert. denied*, 420 U.S. 909, 95 S.Ct. 829, 42 L.Ed.2D 839 (1975); *United States v. Goodwin*, 440 F.2d 1152, 1157 (3d Cir. 1971). It therefore follows that the language concerning the capacity in which James and Guido committed the crime is surplusage and need not be proved, and the jury need not have been so charged.

In their memorandum of law in support of their motion for a new trial, the defendants allege a fatal variance between the indictment and the Court's charge. The Court finds no basis for such a contention. Defendants rely on *United States v. Smolar*, 557 F.2d (1st Cir.), *cert. denied*, 434 U.S. 971, 98 S.Ct. 523, 54 L.Ed.2d 461 (1977), which held that the Court may not in its instruction change the charging part of an indictment "to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes." *Id.*

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indictment—and I have read those dates to you, and you will have it with you out there.

These are the elements:

Number 1. That the defendant discharged a pollutant;

Number 2. That the defendant's discharge of the pollutant was done willfully or negligently;

Third. That the defendant did not have a permit to discharge the pollutant.

at 19 (quoting *Stirone v. United States*, 361 U.S. 212, 216, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) ). The fact that the charge did not mention co-owners and officers of Frezzo Bros. did not in any way change the charging part of the indictment as discussed in *Smolar*. The indictment was read to the jury and it went out with the jury during its deliberations. Furthermore, all of the evidence presented by the Government concerning James and Guido pointed to the fact that they were in control of the operation of Frezzo Bros. We are, therefore, unable to find any error in charge.

*E. Motion to Suppress.*

[8] Defendants contend that the Court should have ordered the suppression of all of the samples taken from the channel box on the west side of Penn Green Road, which channel box was not located on the Frezzo property. At the suppression hearing, however, there was no evidence presented that the defendants were on the premises at the time of the seizure of the samples, that the defendants had a legitimate proprietary or possessory interest in the premises or that the defendants were charged with an offense that includes as an essential element of the offense possession of the samples seized. *Brown v. United States*, 411 U.S. 223, 230, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973). Thus, the defendants lacked standing to object to the seizure of the samples taken from the channel box, and we correctly denied their pretrial motion to suppress.

While we do not herein discuss all the contentions of alleged error raised by the defendants, we have considered each and every allegation of error and hold that none of them, singly or collectively, is of sufficient substance to merit any further discussion as a basis for granting a judgment of acquittal or a new trial in this case.

Accordingly, an Order will be entered denying the defendants' motions for judgment of acquittal and a new trial.

## APPENDIX B

**UNITED STATES of America, Appellee,**

**v.**

**FREZZO BROTHERS, INC., Guido Frezzo, and James L. Frezzo, Appellants.**

**Nos. 78-2670 to 78-2675.**

United States Court of Appeals,

Third Circuit,

Argued June 7, 1979.

Decided July 13, 1979.

Rehearing Denied Oct. 22, 1979.

Defendants were convicted in the United States District Court for the Eastern District of Pennsylvania, 461 F.Supp. 266, Raymond J. Broderick, J., of willfully or negligently discharging pollutants into navigable water of the United States without a permit, and they appealed. The Court of Appeals, Rosenn, Circuit Judge, held that: (1) there were no civil prerequisites to government's maintenance of criminal proceedings under the Act; (2) there was no requirement that Environmental Protection Agency promulgate effluent standards applicable to compost-manufacturing business prior to prosecution; and, (3) evidence supported convictions.

Affirmed.

**1. Navigable Waters 35**

There are no civil prerequisites to government's maintenance of criminal proceedings under the Federal Water Pollution Control Act. Federal Water Pollution Control Act Amendments of 1972, § 309(c), 33 U.S.C.A. § 1319(c).

**2. Navigable Waters 35**

There is no requirement that defendants be shown to have not complied with existing effluent limitations

under the Federal Water Pollution Control Act before violation of section prohibiting willfully or negligently discharging pollutants into navigable water of the United States without a permit. Federal Water Pollution Control Act Amendments of 1972, § 301(a), 33 U.S. C.A. § 1311(a).

**3. Navigable Waters 35**

Promulgation of effluent limitations standards is not a prerequisite to maintenance of criminal proceeding based on violation of section of the Federal Water Polution Control Act Amendments of 1972 prohibiting willful or negligent discharge of pollutants into navigable waters of the United States without a permit. Federal Water Pollution Control Act Amendments of 1972, § 301(a), 33 U.S.C.A. § 1311(a).

**4. Navigable Waters 35**

Evidence, in prosecution for willful or negligent discharge of pollutants into navigable water of the United States without a permit, was sufficient to support convictions. Federal Water Pollution Control Act Amendments of 1972, §§ 101-517, 301(a), 309(c), 33 U.S.C.A. §§ 1251-1376, 1311(a), 1319(c).

**5. Criminal Law 870**

Special verdicts are generally disfavored in criminal cases.

**6. Criminal Law 798½**

Where evidence was sufficient to sustain each count of willful or negligent discharge of pollutants into navigable water of United States without a permit on theory of willful discharge on counts one through four and on theory of negligent discharge under counts five and six, there was no compelling necessity for special verdict, particularly in light of fact that there is no variance in statutory penalty between willful and negligent violations and, therefore, trial judge did not abuse discretion in declining to submit special verdict. Federal

Water Pollution Control Act Amendments of 1972, §§ 101-517, 301(a), 309(c), 33 U.S.C.A. §§ 1251 1376, 1311(a), 1319(c).

William J. Gallagher (argued), Randy L. Sebastian, MacElree, Harvey, Gallagher & Kean, Ltd., West Chester, Pa., for appellants.

Peter F. Vaira, U.S. Atty., Walter S. Batty, Jr., Asst. U.S. Atty., Chief, App. Div., Bruce J. Chasan (argued), Asst. U.S. Atty., Philadelphia, Pa., for appellee.

Before ADAMS and ROSENN, Circuit Judges, and LACEY, District Judge.*

## OPINION OF THE COURT

ROSENN, Circuit Judge.

Since the enactment in 1948 of the Federal Water Pollution Control Act, 62 Stat. 1155 ("the Act"), the Government has, until recent years, generally enforced its provisions to control water pollution through the application of civil restraints.[1] In this case, however, the Government in the first instance has sought enforcement of the Act as amended in 1972, 33 U.S.C.A. §§ 1251-1376 (Supp. 1973), against an alleged corporate offender and its officers by criminal sanctions. Whether the Government may pursue the criminal remedies under the Act before instituting a civil action or before giving written notice of the alleged violation is the principal issue presented in this appeal.

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* Honorable Frederick B. Lacy, United States District Judge for the District of New Jersey, sitting by designation.

1. In a comprehensive analysis made in 1973 of the use of criminal sanctions under the Federal Water Pollution Act, Michael K. Glenn, former deputy assistant administrator for federal water enforcement, pointed out that: "[D]uring the past 25 years the federal government has relied almost exclusively on negotiation, public pressure, and voluntary compliance by dischargers as the principal means of achieving compliance with federal water pollution control laws." Glenn, *The Crime of "Pollution": The Role of Federal Water Pollution Criminal Sanctions*, 11 Am.Crim.L.Rev. 835, 836 (1973) (foot-note omitted).

The appellants were convicted by a jury on six counts of willfully or negligently discharging pollutants into a navigable water of the United States without a permit, in violation of 33 U.S.C. §§ 1311(a), 1319(c). The corporate defendant, Frezzo Brothers, Inc., was fined $50,000, and the individual defendants, Guido and James Frezzo received jail sentences of thirty days each and fines aggregating $50,000. The Frezzos appeal from the trial court's final judgment of sentence. We affirm.

I.

Frezzo Brothers, Inc., is a Pennsylvania corporation engaged in the mushroom farming business near Avondale, Pennsylvania. The business is family operated with Guido and James Frezzo serving as the principal corporate officers. As a part of the mushroom farming business, Frezzo Brothers, Inc., produces compost to provide a growing base for the mushrooms. The compost is comprised mainly of hay and horse manure mixed with water and allowed to ferment outside on wharves.

The Frezzo's farm had a 114,000 gallon concrete holding tank designed to contain water run-off from the compost wharves and to recycle water back to them. The farm had a separate storm water run-off system that carried rain water through a pipe to a channel box located on an ajoining property owned by another mushroom farm. The channel box was connected by a pipe with an unnamed tributary of the East Branch of the White Clay Creek. The waters of the tributary flowed directly into the Creek.

Counts One through Four of the indictment charged the defendants with discharging pollutants in to the East Branch of the White Clay Creek on July 7, July 20, September 20, and September 26, 1977. On these dates Richard Casson, a Chester County Health department investigator, observed pollution in the tributary flowing into the Creek and collected samples of wastes

flowing into the channel box. The wastes had the distinctive characteristics of manure and quantititave analysis of the samples revealed a concentration of pollutants in the water. The Government introduced meteorological evidence at trial showing that no rain had been recorded in the area on these four dates. Based on this evidence, the Government contended that the Frezzos had willfully discharged manure in to the storm water runoff system that flowed into the channel box and into the stream.

Investigator Casson returned to the Frezzo farm on January 12, 1978, to inspect their existing water pollution abatement facilities. Guido and James Frezzo showed Casson both the holding tank designed to contain the waste water from the compost wharves, and the separate storm water runoff system. Casson returned to the farm on May 9, 1978 with a search warrant and several witnesses. This visit occured after a morning rain had ended. The witnesses observed the holding tank overflowing into the storm water run-off system. The path of the wastes from the Frezzo holding tank to the channel box and into the stream was photographed. James Frezo was present at the time and admitted to Casson that the holding tank could control the water only 95% of the time. Samples were again collected, subjected to quantitative analysis and a high concentration of pollutants was found to be present. This incident gave rise to Count Five of the indictment.

Additional samples were collected from the channel box on May 14, 1978, after a heavy rain. Again, a concentration of pollutants was found to be present. This evidence served as the basis for Count Six of the indictment. At trial, the Government introduced evidence of the rainfall on May 9 and May 14, along with expert hydrologic testimony regarding the holding capabilities of the Frezzos' tank. The Government theorized that the holding tank was too small to contain the compost

wastes after a rainstorm and that the Frezzos had negligently discharged pollutants into the stream on the two dates in May.

The jury returned guilty verdicts on all six counts against the corporate defendant, Frezzo Brothers, Inc., and individual defendants, Guido and James Frezzo. The trial court denied the defendants' motions for judgment of acquittal and new trial in a memorandum opinion, *United States v. Frezzo Brothers, Inc.*, 461 F.Supp. 266 (E.D.Pa. 1978).

II.

[1] The Frezzos first argue that the Administrator of the Environmental Protection Agency must either give them some notice of alleged violations of the Federal Water Pollution Control Act, or institute a civil action before pursuing criminal remedies under the Act, Judge Broderick, the trial judge, rejected this argument, 461 F.Supp. at 268, relying primarily on *United States v. Phelps Dodge*, 391 F.Supp 1181 (D. Ariz. 1975), which held that there were no civil perequisites to the Government's maintenance of criminal proceedings under this Act. We agree.

The enforcement provisions of the Act are contained in 33 U.S.C. §1319. The criminal provision of the Act, §1319(c) provides in relevant part.

> (1) Any person who willfully or negligently violates section 1311 . . . of this title . . . shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both . . . .

This provision is preceded by §1319(a) dealing with state enforcement and compliance orders, and §1319(b) governing civil actions. There is conflicting legislative history with respect to whether a compliance order or a civil suit by the Administrator should be a prerequisite to the Government's institution of criminal proceedings

under §1319(c).[2] The district court in *Phelps Dodge*, however, relied on the final House Committee Report which clearly indicated that writtten notice of the violation, administrative, civil, or criminal remedies under the Act were to be *alternative* remedies. The key portion of the House Committee Report provides:

> Whenever on the basis of any information available to him the Administrator finds that anyone is in violation of any of these requirements, he *may* take *any* of the following enforcement actions: (1) he shall issue an order requiring compliance; (2) he shall notify the person in alleged violation in such state of such finding . . . or (3) he shall bring a civil action; of (4) he shall cause to be instituted criminal proceedings.

*Legislative History, supra* at 801-02 (emphasis supplies). This statement led the court in *Phelps Dodge* to conclude that the Administrator "is not required to proceed first to effect a correction by civil means before instituting criminal proceedings." 391 F.Supp. at 1184. An identical result was reached by the court in *U.S. v. Hudson Farms, Inc.*, 12 E.R.C. 1144, 1146 (E.D.Pa. 1978).[3]

We believe that these cases place a correct gloss on the enforcement provisions of the Act.[4] There is nothing in the text of §1319(c) that compels the conclusion that

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2. Senator Muskie expressed the view in the Senate's consideration of the Conference Committee Report that an abatement order or civil action was mandatory under the Act. A Legislative History of the Federal Water Pollution Control Act Amendments of 1972, U.S. Government Printing Office, at 174. A similar view was espoused by Representative Harsha in the House during debate on the House Bill. *Legislative History, supra* at 530.

3. This case was decided after the district court's decision in the present case and hence was not considered by the court reaching its decision.

4. For a general review of the 1972 amendments *see* Comment. *The Federal Water Pollution Control Act Amendments of 1972*, 1973 Wis.L. Rev. 893 (1973).

prior written notice, other administrative or civil remedies are prerequisite to criminal proceedings under the Act. The Senate acceded to the House in not making civil enforcement mandatory upon the Administrator under section 1319. *Legislative History, supra* at 174. Hence, we can only conclude that whatever support existed for the position urged by the Frezzos did not prevail in the enactment of the final Bill.

Further, we see no reason why the Government should be hampered by prerequisites to seeking criminal sanctions under the Act. The Frezzos urge that it can only be through prior notification, followed by continued polluting in the face of such notice, that willful violations of the Act can be established. We find this argument unconvincing. Although continued discharges after notification could be one way for the Government to prove scienter, it is certainly not the only way to establish willful violations. The Government could logically argue, as it did in this case, that the circumstances surrounding the alleged discharge manifested willful violations of the Act and that it had the power to pursue criminal rather than civil sanctions. Furthermore, in view of the broad responsibilities imposed upon the Administrator of the EPA, he should be entitled to exercise his sound discretion as to whether the facts of a particular case warrant civil or criminal sanctions.[5] We therefore hold that the

5. There is evidence in the Legislative History of the 1972 Amendments to the Act that the new criminal sanctions were designed to strengthen the ability of the Government to pursue criminal remedies for water pollution. *See Legislative History, supra* at 216-17, 663, 1481-82. Further, Glenn indicates that: "One of the prevalent feelings of the Congress during consideration of the enforcement aspects of the 1972 Amendments was that the enforcement mechanism of the previous law [Rivers and Harbors Act of 1899, commonly known as the Refuse Act] did not allow (or require) prompt enforcement action." Glenn, *supra* note 2, at 866 n. 140. Thus, it is evident that prerequisites to the pursuit of criminal sanctions under the Act would be inconsistent with Congress' desire for a stronger enforcement mechanism.

Administrator of the EPA is not required to pursue administrative or civil remedies, or give notice, before invoking criminal sanctions under the Act.

III.

[2] The Frezzos next contend that the indictment should have been dismissed because the EPA had not promulgated any effluent standards applicable to the compost manufacturing business. The Frezzos argue that before a violation of §1311(a) can occur, the defendants must be shown to have not complied with existing effluent limitations under the Act. The district court disagreed, finding no such requirement. 461 F.Supp. at 268-69. We agree with the district court.

The core provision of the Act is found in §1311(a) which reads:

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutants by any person shall be unlawful.

Section 1311(b) then sets out a timetable for the promulgation of effluent limitations for point sources and section 1312 provides for the establishment of water quality related effluent limitations. The Frezzos contend that they cannot have violated the Act because the EPA has not yet promulgated effluent limitations which they can be held to have violated. Appellants rely primarily on *United States v. GAF Corporation*, 389 F.Supp. 1379 (S.D. Texas 1975) as support for their position. That case did hold that before an abatement order may be issued pursuant to §1319(a)(3) of the Act, the defendants must be shown to have violated an applicable effluent limitation. 389 F.Supp. at 1385-86. The Government argues, however, that the decision is incorrect and cites *American Frozen Food Institute v. Train*, 176 U.S.App.D.C. 105, 113, 539 F.2d 107, 115 (1976) for the proposition that:

> By 1972 Congress determined upon wholly a new approach. The basic concept of the Act [section 1311(a)] we construe in this case is an ultimate flat prohibition upon all discharges of pollutants . . . .

Indeed, the court specifically noted that "[t]his prohibition which is central to the entire Act is statutory and requires no promulgation." *Id.*, 176 U.S.App.D.C. at 126, 539 F.2d at 128.

The Sixth Circuit has enforced criminal penalties for violation of section 1311(a). In *United States v. Hamel*, 551 F.2d 107, 109 (6th Cir. 1977), the court state: "The negligent or willful violation of §1311(a), however, without justification subjects one to the criminal sanctions [sic] §1319(c)(1)." The Government contends in the instant case that the lack of effluent limitations is no defense to a violation of §1311(a). It argues that when no effluent limitations have been established for a particular business, the proper procedure is for the business to apply for a permit to discharge pollutants under 33 U.S.C. §1342(a), which allows the Administrator to establish interim operating conditions pending approval.[6] The district court in *GAF* explicitly rejected this argument as placing too harsh a burden on the defendant because it viewed the Act as not allowing any discharge pending approval of the permit. 389 F.Supp. at 1386. The Government contends in the present case, however, that the absence of effluent limitations should not be allowed to nullify the flat prohibition on discharges under §1311(a). We agree.

The *GAF* court appropriately recognized that the

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6. 33. U.S.C. §1342(a)(1) provides in relevant part:

> [T]he Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet all applicable requirements . . . , or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the administrator determines are necessary to carry out the provisions of this chapter.

legislative history of the Act was "curiously incomplete" on the issue in question. *Id.* We therefore must interpret the statute in a fashion that best effectuates the policies of the Act. The basic policy of the Act is to halt uncontrolled discharges of pollutants into the waters of the United States. 33 U.S.C. §1251. In fact, the Act sets forth "the national goal that the discharge of [all] pollutants into the navigable waters be eliminated by 1985." *Id.* §1251(a)(1); *United States v. Hamel, supra* at 109. We see nothing impermissible with allowing the Government to enfore the Act by invoking §1311(a), even if no effluent limitations have been promulgated for the particular business charged with polluting. Without this flexibility, numerous industries not yet considered as serious threats to the environment may escape administrative, civil, or criminal sanctions merely because the EPA has not established effluent limitations. Thus, dangerous pollutants could be continually injected into the water solely because the administrative process has not yet had the opportunity to fix specific effluent limitations. Such a result would be inconsistent with the policy of the Act.

We do not believe, as did the court in *GAF*, that the permit procedure urged by the Government is unduly burdensome on business. If no effluent limitations have yet been applied to an industry, a potential transgressor should apply for a permit to discharge pollutants under section 1342(a). The administrator may then set up operating conditions until permanent effluent limitations are promulgated by EPA. The pendency of a permit application, in appropriate cases, should shield the applicant from liability for discharge in the absence of a permit. 33 U.S.C. §1342(k). *See Stream Pollution Con. Bd. of Ind. v. U.S. Steel Corp.*, 512 F.2d 1036, 1041 n. 12 (7th Cir. 1975). EPA cannot be expected to have anticipated every form of water pollution through the establishment of effluent limitations. The permit procedure, coupled with broad enforcement under §1311(a) may, in

fact, allow EPA to discover new sources of pollution for which permanent effluent standards are appropriate.

[3] In the present case, it is undisputed that there was no pending permit to discharge pollutants; nor had Frezzo Brothers, Inc., ever applied for one. This case, therefore, appears to be particularly compelling for broad enforcement under sections 1311(a), 1319(c)(1). The Frezzos, under their interpretation of the statute, could conceivably have continued polluting until EPA promulgated effluent limitations for the compost operation. The Government's intervention by way of criminal indictments brought to a halt potentially serious damage to the stream in question, and has no doubt alerted EPA to pollution problems posed by compost production. We therefore hold that the promulgation of effluent limitation standards is not a prerequisite to the maintenance of a criminal proceeding based on violation of section 1311(a) of the Act.

## IV.

[4] The Frezzos next contend that there was insufficient evidence to convict them of the charges in the indictment. They virtually concede that the Government presented sufficient evidence to sustain Count Five. However, defendants charge that the Government, *inter alia*,[7] had failed to prove willful or negligent discharges of pollutants. We disagree because we are persuaded that substantial evidence in the record supports all six counts of the indictment.[8]

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7. The defendants also argued that the Government failed to produce sufficient evidence to identify them as the parties responsible for the discharges. We believe the district court correctly concluded, 461 F.Supp. at 270-71, that sufficient evidence of identification was produced at trial.

8. Judge Broderick stated in denying the defendants' motions for acquittal and a new trial:

> The Government's case was strong, and there can be no doubt that the evidence was sufficient to support the jury's verdict as to each of the defendants and as to each of the six counts of the indictment.

461 F.Supp. at 270.

The Government contended at trial that the discharges giving rise to Counts One through Four of the indictment were willful. To establish this claim, the Government relied on the samples collected on those four occasions, the absence of rain on the dates in question, and the elimination of other possible causes for the pollution. The Frezzos maintain that the Government on this evidence failed to establish a willful act. We disagree. The jury was entitled to infer from the totality of the circumstances surrounding the discharges that a willful act precipitated them. The Government did not have to present evidence of someone turning on a valve or diverting wastes in order to establish a willful violation of the Act.[9]

The Government's theory on Counts Five and Six was that the discharges were negligently caused by the inadequate capacity of the holding tank. Count Five was amply supported by eyewitness testimony, samples of the pollutants, evidence of rainfall and expert hydrologic evidence of the holding tank's capacity. Count Six was similarly supported by evidence of rainfall, samples, expert testimony and photographs of the holding tank three days before the incident, showing it to be near capacity. The jury could properly have concluded that the water pollution abatement facilities were negligently maintained by the Frezzos and were insufficient to prevent discharges of the wastes. We therefore conclude that there was sufficient evidence to sustain the verdict on all six counts.

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9. Judge Broderick noted:

> Testimony was presented by several witnesses that on many occasions, commencing as far back as 1970, the defendants in this case had been investigated, visited and confronted by a number of state and county employees concerning the fact that the stream in question was being polluted by runoff from the compost operation conducted by the defendants on the Frezzo property.

461 F.Supp. at 270.

## V.

Defense counsel requested at trial that a special verdict be submitted to the jury in order to determine, if a guilty verdict were returned, whether the jury found the defendants guilty of a willful or a negligent violation under each count. The trial judge denied the request. The Frezzos maintain that this denial constitutes reversible error. We cannot agree.

[5] We start with the proposition that special verdicts are generally disfavored in criminal cases. *United States v. Munz*, 542 F.2d 1382, 1389 (10th Cir. 1976), *cert, denied*, 429 U.S. 1104, 97 S.Ct. 1133, 51 L.Ed.2d 555 (1977); *United States v. Jackson*, 542 F.2d 403, 412 (7th Cir. 1976). There is the belief that in the long run special verdicts are not favorable to defendants because "[b]y a progression of questions each of which seems to require an answer unfavorable to the defendant, a reluctant juror may be led to vote for a conviction which, in the large, he would have resisted." *United States v. Spock*, 416 F.2d 165, 182 (2d Cir. 1969). See *United States v. McCracken*, 488 F.2d 406, 419 (5th Cir. 1974).

[6] The defendants maintain nevertheless, that it was important for the court to know whether the discharges were found to be willful or negligent under each Count, in order to assess the sufficiency of the evidence and for sentencing purposes. The Government, however, proceeded on a theory of willful discharge under Counts One through Four and on a theory of negligent discharge under Counts Five and Six. We have already noted our agreement with the district court's conclusion that the evidence was sufficient to sustain each of the counts on those theories. Hence, although a special verdict might have been illuminating, there was no compelling necessity for one in this case. Further, there is no variance in the statutory penalty between willful and negligent violations. It therefore would have been within the judge's discretion to sentence the defendants to the statutory maximum had the jury returned a special ver-

dict finding the defendants guilty of negligent violations only. Indeed, it appears that the judge might have done so since he sentenced the defendants more severely under the negligent counts.[10] We therefore conclude that the trial judge did not abuse his discretion in declining to submit a special verdict in the instant case.

Appellants raise other contentions on appeal all of which are without merit.[11] We perceive no prejudice to the defendants meriting reversal of the verdict and the grant of a new trial. Accordingly, the judgment of the district court will be affirmed.

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10. The jail sentences were imposed only for Count Five and the defendants were more heavily fined under Counts Five and Six.

11. Defendants contend that the trial judge improperly instructed the jury that they could be found guilty as individuals when the indictment charged them with acting as corporate officers. The Government argued the case on the "responsible corporate officer doctrine" recognized by the Uinted States Supreme Court in *United States v Park*, 421 U.S. 658, 95 SCt. 1903, 44 L.Ed.2d 489 (1974) and *United States v. Dotterweich*, 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48 (1943). We have examined the judge's charge and we perceive no error in the instruction to the jury on this theory.

Defendants also contend that the district court erred in failing to suppress the samples from the channel box because they were taken without a search warrant. However, the channel box lay on property not onwed by the Frezzos. The district court held tht because defendants had no legitimate proprietary or possessory interest in the neighboring property and because possession was not an element of the offense charged, they lacked standing under the fourth amendment to contest the seizure of the samples. The United States Supreme Court, however, in *Rakas v. Illinois*, 439 U.S. 128, 138-139, 99 S.Ct. 421. 58 L.Ed.2d 387 (1978), dropped the issue of standing from consideration in fourth amendment cases in favor of an inquiry into the extent of an individual defendant's rights under the fourth amendment. Nevertheless, it is still clear under *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969) that fourth amendment rights are personal and cannot be vicariously asserted. We agree that defendants had no proprietary or possessory interest in the searched premises nor was possession an element of the offense. Hence, there are no personal rights that may be substantively asserted under the fourth amendment. *Rakas, supra*, 439 U.S. at 140-141, 99 S.Ct. 421.

## APPENDIX C

UNITED STATES of America
v.
FREZZO BROTHERS, INC., Guido Frezzo and James L. Frezzo.

Crim. No. 78-218.

United States District Court,
E. D. Pennsylvania.
June 27, 1980.

Petitions were filed seeking vacation of sentences previously imposed upon petitioners following their conviction for discharging pollutants into navigable waters without permit. The District Court, Raymond J. Broderick, J., held that: (1) petitioners were not denied effective assistance of counsel because their trial counsel did not contend that their activities were exempt from permit requirements of Federal Water Pollution Control Act where the applicable regulations exempted natural runoff of rainwater from agricultural activities and did not exempt return flow of irrigation water, and discharge caused by petitioner's business, the manufacture of mushroom compost, emanated from concrete holding tank erected to collect runoff from mushroom compost piles being used in manufacture of the compost, and (2) petitioners' due process rights were not violated on basis that applicable regulations failed to provide fair warning that petitioners' pollution activities were in violation of the Act.

Motions denied.

**1. Criminal Law 641.13(2)**

Petitioners, who had been found guilty of discharging pollutants into navigable waters without permit, were not denied effective assistance of counsel because their trial counsel did not contented that their activities were exempt from permit requirements of Federal Water Pollution Control Act where the applicable regula-

tions exempted natural runoff of rainwater from agricultural activities and did not exempt return flow of irrigation water, and discharge caused by petitioner's business, the manufacture of mushroom compost, emanated from concrete holding tank erected to collect runoff from mushroom compost piles being used in manufacture of the compost. Federal Water Pollution Control Act Amendments of 1972, §§ 301(a), 309(c), 33 U.S.C.A. §§ 1311(a), 1319(c); 28 U.S.C.A. § 2255.

**2. Constitutional Law 278.1**

Convictions for discharge of pollutants into navigable waters without permit did not violate due process on basis that activities were exempt from permit requirements of Federal Water Pollution Control Act where applicable regulation did not exempt the activities from permit requirements. Federal Water Pollution Control Act Amendments of 1972, §§ 301(a), 309(a), 309(c), 33 U.S.C.A. §§ 1311(a), 1319(c); 28 U.S.C.A. § 2255; U.S.C.A. Const. Amend. 5.

**3. Constitutional Law 278.1**

Due process rights of petitioners, who had been found guilty of discharging pollutants into navigable waters without permit, were not violated on basis that sections of applicable regulations failed to provide fair warning that petitioners' pollution activities were in violation of Federal Water Pollution Control Act. Federal Water Pollution Control Act Amendments of 1972, §§ 301(a), 309(c), 33 U.S.C.A. §§ 1311(a), 1319(c); 28 U.S.C.A. § 2225.

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John Rogers Carroll, Thomas Colas Carroll, Carroll, Creamer, Carroll & Duffy, Philadelphia, Pa., for plaintiffs.

Peter F. Vaira, U.S. Atty., Bruce J. Chasan, Asst. U.S. Atty., Philadelphia, Pa., for defendant.

MEMORANDUM

RAYMOND J. BRODERICK, District Judge.

Petitioners James Frezzo, Guido Frezzo, and Frezzo Brothers, Inc. (Frezzo Bros.) were found guilty by a jury of discharging pollutants into navigable waters of the United States without a permit in violation of the Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1311(a), 1319(c) (Act). James Frezzo and Guido Frezzo have filed petitions under 28 U.S.C.A. § 2255 or, in the alternative, for writs of error coram nobis, for vacation of the sentences imposed upon them by this Court. Frezzo Bros. has filed a petition for a writ of error coram nobis seeking the same relief. The petitioners claim that they were exempt from the permit requirements of the Act by virtue of 40 C.F.R. §125.4(i) (1978), which was in effect at the time the petitioners were indicated and convicted, but has subsequently been revised.

Petitioners did not raise this issue at the time of their trial, nor was the issue raised in pre-trial or post-trial motions or on direct appeal. *See United States v. Frezzo Brothers, Inc.*, 461 F. Supp. 266 (E.D.Pa.1978), *aff'd*, 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, __U.S.__ 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980). After their convictions were affirmed by the Third Circuit, petitioners retained their present counsel, who petitioned the Third Circuit for a rehearing on the ground that the petitioners' activities were exempt from the permit requirements of the Act by virtue of 40 C.F.R. § 235.4(i). The Third Circuit denied the petition for rehearing without addressing its merits. A petition for a writ of certiorari was denied by the Supreme Court, after which petitioners filed these motions for relief under section 2255 or for a writ of error coram nobis. We

heard oral argument on these motions and for the reasons hereinafter set forth, the petitioners' motions will be denied.

The evidence at the trial of this action showed that Guido Frezzo and James Frezzo were the president and secretary, respectively, of Frezzo Bros., a family business organized for the purpose of growing mushrooms and manufacturing mushroom compost, which is necessary for growing mushrooms. The primary ingredient of mushroom compost is horse manure. The petitioners built a large concrete holding tank on their property to catch all of the runoff from the mushroom compost pile. The petitioners' property contains two runoff systems. One system gathers the runoff from the compost pile into the holding tank described above and recirculates this runoff back to the compost pile by a system of pumps. The other system gathers the storm water runoff from the property and empties this storm water runoff into a pipe that runs approximately 200 feet from the Frezzo Bros. property into an unnamed branch of a creek which ultimately runs into the Delawre River. On each of the six dates charged in the indictment, runoff from the compost system made its way into the storm water runoff system and was permitted to be discharged into the branch of the creek. Samples of the runoff taken at these times contained pollutants that may not be discharged under the Act without a permit. There was uncontradicted testimony that none of the petitioners had ever been issued a permit by the EPA.

The administrative history of these regulations, as reported in the Federal Register, 41 Fed.Reg. 7963 (1976), explicitly states that the sole intent of sections 125.4(i) and 125.53 of these regulations was to make it clear that the return flow of water used for irrigation purposes which contained pollutants was not exempt from the permit requirements of the Act. These sections of the regulations specifically subjected the return flow of irrigation water to the permit requirements of the Act,

and exempted the natural runoff of rain water from these permit requirements.

The record in this case clearly shows that the discharge of pollutants for which the petitioners were convicted was not from the natural runoff of rain water from the petitioners' land. These discharges emanated from a concrete holding tank which was erected to collect the runoff from mushroom compost piles being used by the petitioners for the purpose of manufacturing compost. The various chemists and physical scientists who testified at the trial of this case classified the samples of the discharges into the stream as "sewage" because the results of the tests conducted by them showed that these samples contained higher concentrations of pollution producing chemicals and bacteria than untreated human sewage. There is no doubt that "sewage" is specifically included in the definition of "pollutant" as set forth in the Act. There was also testimony at the trial that as early as 1970 the petitioners had been investigated, visited, and confronted by a number of state and county employees concerning the fact that the stream in question was being polluted by "sewage" from their mushroom composting operations.

We therefore find that pursuant to *United States v. DeFalco*, No. 78-2126 (3d Cir. Dec. 28, 1979), the trial counsel for the petitioners exceeded the standard of "customary skill and knowledge which normally prevails at the time and place," and that the petitioners have failed to show any "specific prejudice" in that sections 125.4(i) and 125.53 of the regulations do not and did not exempt the activities of the petitioners from the permit requirements of the Act.

[2] The petitioners also contend that their convictions violated due process because these sections of the EPA's regulations excluded their discharges into the stream from the permit requirements of the Act. Since we have already determined, however, that these sections of the regulations do not and did not exempt the

discharges of the petitioners from the permit requirements of the Act, this claim is without merit.

[3] The final contention that we must address is whether the petitioners' due process rights were violated because sections 125.4(i) and 125.53 of the regulations failed to provide the petitioners fair warning that their pollution activities were in violation of the Act. Petitioners contend that these sections of the regulations deprived them of fair warning that their conduct was criminal because they purported "to give notice to persons of common intelligence . . . that the . . . petitioners' activities were excluded from the Act's criminal sanctions." In essence, the petitioners contend that they were "affirmatively misled" by these regulations into believing that the Act did not require them to procure a permit. *United States v. Pennsylvania Industrial Chemical Corporation*, 411 U.S. 655, 93 S.Ct. 1804, 1816, 36 L.Ed.2d 567 (1973). *See Cox v. Louisiana*, 85 S.Ct. 476 (1965); *Raley v. Ohio*, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959). Our review of the entire record in this case, however, reveals that the petitioners have never attempted to establish that they relied on these regulations in deciding not to apply for a permit. In fact, these regulations were never mentioned in the record until the petitioners filed a motion for a rehearing in the court of appeals after their original appeal had been decided adversely to them. Since the petitioners have not shown that they ever relied on these regulations, they cannot claim that the regulations would have led them to believe that their business activities were exempt from the permit requirements of the Act. *United States v. United States Steel Corp.*, 482 F.2d 439 (7th Cir. 1973); *Pennsylvania Industrial, supra*. Furthermore, as we pointed out in *United States v. Frezzo Bros., Inc.*, 461 F.Supp. 266 (E.D. Pa. 1978), section 301(a) of the Act, 33 U.S.C.A. §1311(a), makes it a crime to discharge pollutants without a permit, and the Act does not require that one who violates the Act receive any warning or notice that his actions are in violation of the Act.

We will therefore deny the petitioners' motion for relief under section 2255 or, alternatively, for writs of error coram nobis.

Erroll THIELECKE, et al., Plaintiffs,
v.
**UNITED STATES of America et al., Defendants.**

**No. 79-1452C(2).**

United States District Court,
E. D. Missouri, E. D.

June 30, 1980.

Plaintiffs, whose predecessors in title were formerly owners in fee simple of certain land appropriated by United States for use in defense related activities in connection with World War II, brought suit to quiet title, set aside deeds, and define rights of themselves and all others similarly situated in the real estate. The District Court, Nangle, J., held that state university qualified as a "state or local government" under Surplus Property Act and was entitled to priority under the Act vis-a-vis plaintiffs' predecessors in title with respect to sale of the land in question.

Motion to dismiss granted.

**1. United States 58(4)**

University of Missouri was a "state or local government" under Surplus Property Act and its regulations and was thus entitled to priority under the Act vis-a-vis plaintiffs' predecessors in title with respect to sale of certain land, which had been appropriated by United States for use in defense related activity in connection with World War II. Surplus Property Act of 1944, §§ 1 et seq., 5, 12, 13, 23, 50 U.S.C. App. (1946 Ed.) §§ 1611 et seq., 1614, 1621, 1622, 1632; V.A.M.S. §§ 172.010-172.030, 172.050; V.A.M.S.Const. Art. 9, § 9(a).

See publication Words and Phrases for other judicial constructions and definitions.

**2. Administrative Law and Procedure 390**

Regulations promulgated to enforce statute must, in order to be valid, be consistent with statute.

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Stephen H. Gilmore and Robert A. Crowe, St. Louis, Mo., for plaintiffs.

Donald U. Beimdiek, Thomas E. Wack, Thomas B. Weaver, St. Louis, Mo., for Conservation Comm. State of Missouri, et al.

Jackson A. Wright, James S. Newberry, Ted D. Ayres and Robert L. Ross, Columbia, Mo., for Curators, U. of Missouri, et al.

Anne T. Shapleigh, Asst. U.S. Atty., U.S. Dept. of Justice, St. Louis, Mo., for United States of America.

## APPENDIX D

UNITED STATES of America
v.
FREZZO BROTHERS, INC.

UNITED STATES of America
v.
FREZZO, Guido

UNITED STATES of America
v.
FREZZO, JAMES L.

Frezzo Brothers, Inc., Guido Frezzo and James L. Frezzo, Appellants.

No. 80-2141.

United States Court of Appeals, Third Circuit.

Argued Jan. 20, 1981.

Decided March 4, 1981.

As Amended March 18, 1981.

Rehearing Denied May 11, 1981.

Petitioners, who were convicted of discharging pollutants into navigable waters without a permit, appealed from an order of the United States District Court for the Eastern District of Pennsylvania, Raymond J. Broderick, J., 491 F.Supp. 1339, which denied their petitions for vacation of sentences. The Court of Appeals, Van Dusen, Senior Circuit Judge, held that: (1) discharges of a compost runoff from a holding tank were not from agricultural point sources within meaning of applicable regulation and therefore discharge of such pollutants into navigable waters did not require a permit assuming the pollution was agricultural, and (2) conviction for discharging pollutants into navigable waters without a per-

mit could not stand without a determination of whether pollution was from agricultural activities and not from agricultural point sources.

Reversed and remanded.

**1. Criminal Law — 1181**

Court of Appeals will not affirm a criminal conviction for discharging pollutants into navigable rivers without a permit if conduct is not illegal under plain language of applicable regulations. Federal Water Pollution Control Act Amendments of 1972, §§301(a), 309(c), 33 U.S.C.A. §§1311(a), 1319(c).

**2. Health and Environment — 25.7(6)**

Discharges of a compost runoff from a holding tank were not from agricultural point sources within meaning of applicable regulation and therefore discharge of such pollutants into navigable waters did not require a permit assuming the pollution was agricultural. Federal Water Pollution Control Act Amendments of 1972, §402, 33 U.S.C.A. §1342.

**3. Health and Environment — 25.7(24)**

Conviction for discharging pollutants into navigable waters without a permit could not stand without a determination of whether pollution was from agricultural activities and not from agricultural point sources. Federal Water Pollution Control Act Amendments of 1972, §§301(a), 309(c), 33 U.S.C.A. §§1311(a), 1319(c).

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Thomas Colas Carroll (argued), John Rogers Carroll, Carroll & Carroll, Philadelphia, Pa., for appellants.

Bruce J. Chasan, Asst. U. S. Atty. (argued), Peter F. Vaira, U. S. Atty., Walter S. Batty, Jr., Asst. U. S. Atty., Chief, Appellate Section, Philadelphia, Pa., for appellee.

Before GIBBONS, VAN DUSEN and WEIS, Circuit Judges.

## OPINION OF THE COURT

VAN DUSEN, Senior Circuit Judge.

Guido and James Frezzo and the corporation Frezzo Brothers, Inc., petitioned under 28 U.S.C. §2255 (1976)[1] for relief from their convictions for discharging pollutants into navigable waters without a permit. The district court denied the petitions. *United States v. Frezzo Bros., Inc.*, 491 F.Supp 1339 (E.D.Pa. 1980).[2] We have jurisdiction under 28 U.S.C. §1291 (1976) to decide the appeal from this final order. We reverse the denial of the petitions and remand for further proceedings.

This court's prior opinion in *United States v. Frezzo Bros., Inc.*, 602 F.2d 1123, 1124-25 (3rd Cir. 1979,) *cert. denied*, 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980), which affirmed the convictions, sets out in detail the facts which led to the original trial. Petitioners grew mushrooms and prepared compost for growing mushrooms. Petitioners stated that after compost is prepared, it is pasteurized to remove ammonia, and then mushrooms are grown in the pasteurized compost. Joint Memorandum of Law in Support of Motions for Collateral Relief, A-23, A-39. On certain dates in 1977-1978, their holding tank containing runoff from the compost overflowed due to heavy rains. The overflow discharged manure and other pollutants through a runoff system into a creek which joins the Delaware River. A jury convicted each of the petitioners on all six counts of discharging pollution "from mushroom compost manufacturing operations"[3] without a permit in violation of 33 U.S.C. §§1311(a) and 1319(c) (1976).[4]

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1. The corporation, as opposed to the individual petitioners, petitioned for a writ of error *coram nobis*.

2. This opinion details the procedural history of the case. *Id.* at 1340.

3. Indictment, *United States v. Frezzo Brothers, Inc.*, 491 F.Supp. 1339 (E.D.Pa.1980).

4. The first district court opinion after the trial, which denied defendants' motions for acquittal or a new trial, provides further

The petitions now on appeal claimed that the discharges from the holding tank did not require a permit due to the exclusion in 40 C.F.R. §§125.4(i) and 125.53(a) (1978) (repealed).[5] These regulations exempted certain agricultural pollution from the statutory permit requirement.[6] The Government moved for summary judgment.[7] The district court did not explicitly grant the motion for summary judgment but it denied

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NOTE — *(Continued)*

background facts. *United States v. Frezzo Brothers, Inc.*, 461 F.Supp. 266 (E.D.Pa.1978), *aff'd*, 602 F.2d 1123 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980).

5. The Environmental Protection Agency (EPA) repealed these regulations on June 7, 1979, in 44 F.R. 32948, effective August 13, 1979, but they were in effect during the alleged discharges of pollutants. For the text of such regulations, see p. 61.

6. *See* note 14 *infra*. Petitioners never raised the agricultural exemption at the original trial or on direct appeal to this court. They first raised it in a petition for rehearing before the original panel, which denied the petition on October 22, 1979. Appellee's brief, Exh. B. The section 2255 petition alleged that petitioners' original counsel was incompetent under Sixth Amendment standards in failing to raise the exemption at the first trial. Because of this Sixth Amendment issue, consideration of the agricultural exemption for the first time on this collateral attack is required.

7. It conceded, solely for the decision on that motion, that the pollution was agricultural, and argued that the petitioners nevertheless were required to obtain a permit.

> "At this stage the court is not concerned with whether or not the Frezzo compost manufacturing operation is an 'agricultural' activity. We may assume that it is. The Government's position is that an agricultural point source is subject to the permit requirement of the Act, 33 U.S.C. §1342. If the court construes the regulation in issue in the manner urged by the defendants, then an evidentiary hearing will be required to afford the defendants an opportunity to prove that their compost operations constitute 'agriculture.' "

Government's Memorandum of Law in Support of Motions for Summary Judgment and Dismissal at 7 (A-51).

the petitions without considering any evidence.[8] It did not decide whether the pollution was agricultural.[9]

We decide on this appeal only whether the convictions for the discharges from the holding tank, assuming this pollution was from agricultural activities and not from agricultural point sources (see text of regulations on page 61), were consistent with the literal words of the regulations. We conclude that, in light of such assumption, the convictions were not consistent with the regulations. Since we remand for the district court to determine whether the pollution was agricultural, see below, we do not decide the underlying Sixth Amendment claim on this appeal. *See* note 6 *supra*.

[1] This court would not affirm criminal convictions if the conduct was not illegal under the plain language of the applicable regulations.[10] Thus, we turn to

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8. *See* note 16 *infra*.

9. The court stated:

> "Although there is a question as to whether the manufacturing of mushroom compost is an 'agricultural activity,' there is no question that the regulations do not and did not exempt the discharge of the pollutants. . . ."

*Frezzo Bros.* 491 F.Supp. at 1342.

10. The Government argues that the plain language of the regulations conflicts with the statute. Since this is a criminal case, petitioners were entitled to rely on the language of the regulations. Those rules must have provided fair notice of what conduct violated the law. Therefore, we need not decide whether the regulations defining agricultural point sources conflicted with the statutory definition of "point source" or whether the regulations were invalid for that reason under *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). The statute reads:

> "(14) The term 'point source' means any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or

the literal words of the EPA regulations. These rules excluded agricultural pollution, except for discharges from "agricultural point sources," from the permit requirement. Section 125.4(i) of the regulations stated:

"The following do not require a NPDES permit:

. . . . .

"(i) Water pollution from agricultural and silvicultural activities, including run-off from orchards, cultivated crops, pastures, rangelands, and forest lands, except that this exclusion shall not apply to the following:

. . . . .

"(3) Discharges from agricultural point sources as defined in §125.53, . . . " Section 125.53 read:

"§125.53 Agricultural activities.

"(a) *Definitions*. For the purpose of this section:

"(1) The term 'agricultural point source' means any discernible, confined and discrete conveyance from which any irrigation return flow is discharged into navigable waters.

"(2) The term 'irrigation return flow' means surface water, other than navigable waters, containing pollutants which result from the controlled application of water by any person to land used primarily for crops, forage growth, or nursery operations.

"(3) The term 'surface water' means water that

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NOTE — *(Continued)*

may be discharged. This term does not include return flows from irrigated agriculture.

33 U.S.C.A. §1362(14) (1978). Pub. L.No.95-217, §33(b), 91 Stat. 1577 (1977), added the last sentence. The amendment effectively eliminated the distinction in 40 C.F.R. §125.53 (1978) (repealed) by also excluding irrigation return flows from the permit requirement.

We do not decide whether the Government's position on the meaning of the statute and the regulations would prevail in a civil action for an injunction.

flows exclusively across the surface of the land from the point of application to the point of discharge."

[2] All parties agree that the discharges of manure from the holding tank were not irrigation return flows as defined in section 125.53(2). The literal language of section 125.53(1) stated that conveyances of irrigation return flows were the only agricultural point sources. Thus, the system discharging the manure was not an agricultural point source under the regulations. Section 125.4(i) appeared to state that no agricultural pollution required a permit with a single exception: pollution from agricultural point sources. Since petitoners' discharges were not from agricultural point sources, the pollution would not have required a permit (assuming the pollution was agricultural).

The district court avoided the effect of this language in the regulations by relying on the administrative history.[11] It held that the holding tank was an agricultural point source even though the tank was not conveying irrigation return flows. We do not believe that the administrative history supports this holding.[12] Statements accompanying the proposed rules (which later become effective) read:

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11. "The administrative history of these regulations, as reported in the Federal Register, 41 Fed. Reg. 7963 (1976), explicitly states that the sole intent of sections 125.4(i) and 125.53 of these regulations was to make it clear that the return flow of water used for irrigation purposes which contained pollutants was not exempt from the permit requirements of the Act. These sections of the regulations specifically subjected the return flow of irrigation water to the permit requirements of the Act, and exempted the natural runoff of rain water from these permit requirements.

"The record in this case clearly shows that the discharge of pollutants for which the petitioners were convicted was not from the natural runoff of rain water from the petitioners' land."
491 F.Supp. at 1342.

12. Even if we agreed that the administrative history supported the district court, we would hesitate to go beyond the literal language of the regulations to uphold a criminal conviction. *See* note 10 *supra*.

"INTENT OF REGULATIONS

"The intent of the regulations is to exclude from the NPDES permit program all natural runoff from agricultural land which results from precipitation events. Because most water pollution related to agricultural activities is caused by runoff resulting from precipitation events and is nonpoint in nature, it is not and should not be subject to the NPDES permit program as it has been administered to date."

41 F.R. 7694 (1976). Precipitation apparently was a cause of the runoff from the holding tank. *Frezzo Bros.*, 602 F.2d at 1125. Other statements in the Federal Register indicate that, under the regulations, all agricultural pollution was caused by either (1) precipitation or (2) irrigation return flows.

"Thus, in formulating the criteria for defining agricultural point sources EPA has specifically excluded those sources that may be furrows, ditches, and drains channeling natural runoff, and specifically included irrigation return flow ditches and drains that convey water resulting from its controlled application by man to navigable waters. When water pollution from irrigation ditches results from precipitation events, that pollution is nonpoint in nature. However, when discharges from irrigation ditches result from the controlled application of water by any person, that pollution is considered a point source and subject to the program proposed herein."

*Id.*[13] This passage sets out two categories of agricultural pollution. The district court appears to have created a third category of agricultural pollution: discharges not

13. When the regulations became effective, the Administrator wrote:

"EPA took the approach in the proposed regulations for agricultural activities of distinguishing water applied to the land

resulting from irrigation return flows yet still requiring a permit. We decline to uphold the denial of the section 2255 petitions on this record, since that denial was based on this third category. We hold that, if petitioners' discharges were agricultural, pollution, then petitioners needed no section 402 permit under the language in the former regulations.[14]

[3] None of the parties has raised on this appeal the issue whether the pollution was in fact agricultural;[15]

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NOTE — (*Continued*)

through the control of any person (irrigated farming) from water reaching the land as a result of precipitation (dry land farming). Thus where the application of water by any person to agricultural land results in the discharge of pollutants into navigable waters, such discharge is subject to the NPDES permit program; where the discharge of pollutants is induced by precipitation, the permit program is not applicable.

41 F.R. 28494—95 (1976).

14. The only permit requirement we consider here is for the specific permits under §402 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1342 (1976).

15. Appellants' "STATEMENT OF THE ISSUES PRESENTED" reads:

> "Did the district Court Err in Holding, On Appellants' Motion For Post-Conviction Relief, That Appellants' Activities Leading To Their Convictoins For Discharge Of Water Pollutants Without A Permit Were Not Colorably Within The 'Agricultural Exclusion' To The Permit Requirement And, Therefore, Appellants Were Not Denied The Effective Assistance of Counsel By The Failure Of Trial Counsel To Call The Court's Attention To The Exclusion?

"Appellant's Joint Brief at 2. Appellee's "QUESTIONS PRESENTED" states:

> "1. Was the discharge of pollutants from appellants' undisputed point source, albeit one which is arguably 'agricultural' in nature, excluded from the permit program under §402 of the Clean Water act by virtue of either §208 of the Act or the regulation at 40 C.F.R. §125.4(1) (1978)?
>
> "2. Were appellants denied effective assistance of counsel by virtue of the fact that their trial counsel did not raise the foregoing issue?"

Appellee's Brief at 2.

the parties have given no indication that they wish this court to decide the issue. The petitions in the district court raised this issue, but that court never decided whether the pollution was agricultural. The district court has heard no evidence[16] and this is an issue of fact. Deciding the issue against either party would be unfair without giving them an opportunity to present evidence and develop a record. Since the record at this stage[17] is insufficient for this panel to decide whether agricultural pollution was present here, we will remand the case for further proceedings.

The judgment of the district court will be reversed and the case remanded for further proceedings consistent with this opinion.

**Kalman R. HETTLEMAN, Secretary, Department of Human Resourses, and William G. Sykes, Acting Director, Maryland Social Services Administration, Appellees,**

**v.**

**Robert BERGLAND, Secretary, U.S. Department of Agriculture; Carol Tucker, Foreman, Assistant Secretary, U.S. Department of Agriculture; Nancy Snyder, Deputy Administrator for Family Nutrition Programs, Food and Nutrition Service, U.S. Dept. of Agriculture; Ray Pugh, Deputy Administrator for Financial Management and Ralph Picone, Regional Director, Food Stamp Program, Mid Atlantic Region, U.S. Department of Agriculture, Appellants.**

**No. 80-1076.**

United States Court of Appeals,
Fourth Circuit.
Argued Nov. 10, 1980.
Decided Feb. 17, 1981.

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16. The only evidence in this section 2255 civil proceeding is an affidavit. A-53 to A-56. The only part of the affidavit relevant to the agricultural issue states "I was aware that three other companies that manufactured compost, Frezzo Borthers, Inc., . . . ." A-56 at No. 8.

17 *See* n.16 *supra*.

In an action by state officials against the Secretary of the Department of Agriculture and other federal officials, of the United States District Court for the District of Maryland at Baltimore, Joseph H. Young, J., 480 F.Supp. 782, entered summary judgment to the State of Maryland. On appeal by the federal defendants, the Court

## APPENDIX E

UNITED STATES of America
v.
FREZZO BROTHERS, INC., Guido Frezzo, James L. Frezzo.

Crim. No. 78-218.

United States District Court,
E. D. Pennsylvania.

July 19, 1982.

As Amended Aug. 31, 1982.

Defendants, who had been convicted of discharging pollutants into navigable waters without a permit, sought vacation of sentences. Following denial of relief, 491 F.Supp. 1339, and reversal and remand by the United States Court of Appeals for the Third Circuit, 642 F.2d 59, the District Court, Raymond J. Broderick, J., held that: (1) mushroom composting operation was not an "agricultural activity" within meaning of regulation providing exemption from permit requirement of Federal Water Pollution Control Act Amendments where, among other things, approximately 90 percent of defendants' compost production was sold to other mushroom growers; (2) even if the composing operation was agricultural activity, the resulting pollution emanated from an "agricultural point source" and thus was not within the exemption; (3) further, regulation did not entitle defendants to relief where they never relied on the regulation; and thus (4) defendants were not denied effective assistance of counsel for failure to raise the regulatory defense.

Petitions denied.

**1. Criminal Law 997.15(2)**

In postconviction proceeding, petitioner bears the burden of persuasion to show the infirmity of his conviction. 28 U.S.C.A. §2255.

**2. Health and Environment 25.7(24)**

Parties claiming exception, in criminal prosecution, from permit requirements of the Federal Water Pollution Control Act Amendments of 1972 had burden to demonstrate that they fell within the exception. Federal Water Pollution Control Act Amendments of 1972, §§301(a), 309(c), 33 U.S.C.A. §§1311(a), 1319(c).

**3. Criminal Law 997.2**

Petitioner seeking postconviction relief must show a reason for his failure to raise collateral challenge at trial and appeal and must show that he was prejudiced by the procedural shortcoming. 28 U.S.C.A. §2255.

**4. Criminal Law 641.13(2)**

Failure to raise a defense did amount to ineffective assistance of counsel where the defense was without merit. U.S.C.A. Const. Amend. 6.

**5. Health and Environment 25.7(24)**

Defendants could not escape liability for willfully or negligently discharging pollutants into navigable waters without a permit on ground of regulation providing exemption for pollution from agricultural activities, where defendants were not aware of the regulation and never claimed that they relied thereon when they made decision to pollute creek. Federal Water Pollution Control Act Amendments of 1972, §§301(a), 402, 402(f), 33 U.S.C.A. §§1311(a), 1342, 1342(f).

**6. Health and Environment 25.7(24)**

So long as defendants dumped pollutants into a navigable stream without a permit, their view as to legality of their actions was irrevelant; applicable statute does not require the government to prove that defendants specifically intended to violate the statute. Federal Water Pollution Control Act Amendments of 1972, §301, 33 U.S.C.A. §1311.

**7. Health and Environment 25.7(13)**

Mushroom composting operation was not an "agricultural activity" within meaning of regulation providing exemption from permit requirement of Federal Water Pollution Control Act Amendments where, among other things, approximately 90 percent of defendants' compost production was sold to other mushroom growers. Federal Water Pollution Control Act Amendments of 1972, §§301, 402, 33 U.S.C.A. §§1311, 1342.

See publication Words and Phrases for other judicial constructions and definitions.

**8. Health and Environment 25.7(13)**

Final analysis of whether activity falls within "agricultural activity" exclusion of regulation from permit requirements of the Federal Water Pollution Control Act Amendments is ultimately a question of law which the court must decide. Federal Water Pollution Control Act Amendments of 1972, §§301(a), 309(c), 33 U.S.C.A. §§1311(a), 1319(c).

**9. Health and Environment 25.7(13)**

Even if mushroom composting conducted by defendants was agricultural activity, pollution discharge permit would be required under the Federal Water Pollution Control Act Amendments on ground that the pollution emanated from an "agricultural point source" within meaning of regulation, since defendants used water, in controlled application, to achieve the proper mixture for creating compost, with result that water accumulated in catch basin and discharged into stream was "irrigation return flow." Federal Water Pollution Control Act Amendments of 1972, §§301(a), 309(c), 33 U.S.C.A. §§1311(a), 1319(c).

See publication Words and Phrases for other judicial construction and definitions.

**10. Criminal Law 641.13(1)**

In order to establish claim of ineffective assistance of counsel, defendants must show that performance of counsel fell below that customary skill and knowledge which normally prevails in the area and that they were prejudiced as a result of trial counsel's failure. U.S.C.A. Const. Amend. 6.

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Peter F. Vaira, U.S. Atty., Bruce J. Chasan, Asst. U.S. Atty., Philadelphia, Pa., for plaintiff.

John Rogers Carroll, Thomas Colas Carroll, Philadelphia, Pa., for defendants.

MEMORANDUM

RAYMOND J. BRODERICK, District Judge.

Defendants Guido Frezzo, James L. Frezzo, and Frezzo Brothers, Inc. (hereinafter "Frezzo Brothers") have petitioned this Court pursuant to 28 U.S.C. §2255 to vacate and set aside their sentences pursuant to their convictions for discharging pollutants into navigable waters without a permit.[1]

The defendants were found guilty by a jury on all six counts of an indictment charging them with willfully or negligently discharging pollutants into navigable waters in violation of Sections 301(a) and 309(c) of the Federal Water Pollution Control Act as amended in 1972 (the "Act"), 33 U.S.C. §§1311(a), 1319(c). Defendants subsequently filed a motion for judgment of acquittal or

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1. The corporation, Frezzo Brothers, Inc., as distinguished from individual petitioners Guido and James Frezzo, petitioned for a writ of error coram nobis. Such petitions have generally been considered as petitions to vacate sentence pursuant to 28 U.S.C. §2255. *See, e.g., United States v. Snead*, Cr. No. 76-502 (E.D. Pa. 1981); *Moore v. United States*, 329 F.2d 821, 822 (8th Cir. 1964), *cert. denied*, 379 U.S. 858, 85 S.Ct. 114, 13 L.Ed.2d 61 (1964); *Jenkins v. United States*, 325 F.2d 942, 945 (3d Cir. 1963), and the corporation's petition has been so considered in the history of this case. *See United States v. Frezzo Brothers, Inc.*, 642 F.2d 59 (3d Cir. 1981).

in the alternative for a new trial. In their motions, on which the Court heard oral argument, the defendants contended:

> (A) That the Court erred in denying the defendants' pretrial motion to dismiss the indictment for failure of the Administrator of the Environmental Protection Agency (EPA) either to notify the defendants of alleged violations or to institute a civil suit against them, prior to the institution of criminal proceedings;
>
> (B) That the Court erred in denying the defendants' pretrial motion to dismiss the indictment on the ground that there were no effluent standards applicable to defendants; and
>
> (C) That there was insufficient evidence presented to prove that the alleged discharge of pollutants was caused either willfully or negligently by any of the defendants, that any of the defendants discharged the pollutants, that the individual defendants were either owners or corporate officers of Frezzo Brothers at the time of the alleged offenses, and that Frezzo Brothers owned the property in question or operated the holding tank in question at the time of the alleged offenses.

Finding no merit in these contentions, this Court denied the motions. The Court imposed the following sentences: thirty days imprisonment and a $25,000 fine for both Guido Frezzo and James L. Frezzo, and a $50,000 fine for Frezzo Brothers, Inc. 461 F.Supp. 266, 268 (E.D. Pa. 1978). The Court's judgment was affirmed by the Third Circuit, 602 F.2d 1123 (3d Cir. 1979). Rehearing was denied, and defendants sought certiorari, which was also denied, 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980). Defendants had obtained new defense counsel prior to filing the aforesaid and instant petitions. In these petitions, the defendants

raised for the first time the argument that they were exempt from 33 U.S.C. §1311(a), which makes its unlawful to discharge pollutants into navigable waters without a permit. Defendants contend that they were exempt by virtue of 40 C.F.R. §125.4(i) (1978), which was in effect at the time the petitioners were indicted and convicted but has subsequently been revised. The government moved for dismissal pursuant to Fed. R. Civ. P. 12(b)(6), contending that petitioners had failed to state a claim upon which relief could be granted. This Court granted the government's motion to dismiss, 491 F.Supp. 1339.

Defendants appealed the dismissal to the Third Circuit, which reversed the dismissal and remanded to this Court for further factual inquiry regarding the status of defendants' business operation and its characterization pursuant to 40 C.F.R. §125.4(i) and for further consideration of the petitions, 642 F.2d 59 (3d Cir. 1981). For the reasons hereinafter set forth, the Court will enter an Order denying defendants' petitions for relief.

[1, 2] The defendants, in order to obtain relief pursuant to 28 U.S.C. §2255 must show that their conviction and sentence is in some way defective because it was unconstitutional, illegal, or "otherwise subject to collateral attack," 28 U.S.C. §2255. The petitioner bears the burden of persuasion to show the infirmity of his conviction. *See Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963); *United States v. Bremer*, 207 F.2d 247 (9th Cir. 1953); *Walden v. United States*, 418 F.Supp. 386 (E.D. Pa. 1976). Here, the defendants claim the protection of a regulation which they allege exempted them from the statute which the jury found beyond a reasonable doubt that they violated. As parties claiming this exception, they bear the burden to demonstrate that they fall within the exception. *See United States v. Cianciulli*, 482 F.Supp. 585, 613 (E.D. Pa. 1979), *aff'd* 624 F.2d 1091 (3d Cir. 1980), *cert. de-*

*nied*, 449 U.S. 1079, 101 S.Ct. 859, 66 L.Ed.2d 802 (1981); *United States v. Rowlette*, 397 F.2d 475 (7th Cir. 1968).

**[3, 4]** As the United States Supreme Court recently stated in *United States v. Frady*, —— U.S. ——, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982):

> Once the defendant's chance to appeal has been waived or exhausted, however, we are entitled to presume he stands fairly and finally convicted, especially when, as here, he already has had a fair opportunity to present his federal claims to a federal forum. Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless post-conviction collateral attacks. To the contrary, a final judgment commands respect.
>
> For this reason, we have long and consistently affirmed that a collateral challenge may not do service for an appeal.

—— U.S. at ——, 102 S.Ct. at 1592 (citations omitted). *See also, United States v. Addonizio*, 442 U.S. 178, 184, 99 S.Ct. 2235, 2239, 60 L.Ed.2d 805 (1979). In *Frady*, the Court held that a convicted defendant seeking to obtain collateral relief based on trial errors to which no contemporaneous objection was made "must show *both* (1) 'cause' excusing his double procedural default, *and* (2) 'actual prejudice' resulting from the errors of which he complains." —— U.S. at ——, 102 S.Ct. at 1593 (emphasis added). Though the instant case involves failure to raise a defense based upon a construction of a regulation rather than a failure to object to allegedly erroneous jury charges, *Frady* is instructive. *Frady* and its predecessors set forth a two-pronged standard for obtaining collateral relief. The petitioner must show a reason for his failure to raise the collateral challenge at trial and ap-

peal *and* he must show that he was prejudiced by the procedural shortcoming (in this case, the failure to raise an alleged regulatory exemption). Defendants have met neither prong of the *Frady* test. They were represented by competent counsel and have not shown that the failure to raise the 40 C.F.R. §125.1, *et seq.* defense amounted to ineffective assistance of counsel, *see* p. 725, *infra*. Nor have defendants shown any other good reason for their failure to raise this defense at trial or on appeal. Second, the petitioners have not shown that they were prejudiced by the failure to raise the regulatory defense because the defense is without merit, see pp. 721–725, *infra*. Therefore, the defendants have failed to meet their burden to show that their conviction and sentence should be vacated.

Defendants were tried before a jury in October 1978, for violations of the Water Pollution Act, specifically 33 U.S.C. §1311(a) which provides:

> (a) Except as in compliance with this section and sections 1312, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. §1319(c) further provides:

> Any person who willfully or negligently violates section 1311 . . . of this title . . . shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both.

The jury, during the Court's instructions, was read the indictment which alleged that on certain dates in 1977 and 1978, the defendants "did willfully and negligently discharge pollutants, that is, wastewaters from mushroom compost manufacturing operations, into the waters of the East Branch of the White Clay Creek, a navigable water of the United States, without having obtained a permit from the Administrator of the Environ-

mental Protection Agency for said discharge." The Court then instructed the jury as to the elements of the crime and as to the statutory definition of "pollutant," a definition that encompasses "dredged soil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into the water." 33 U.S.C. §1362(6).

The jury was told "If you find that a substance allegedly discharged by a defendant is any one or more of the items specified in the statute's definition of 'pollutant,' then you may find that the substance is a pollutant." The jury was also instructed as to the statutory definition of a point source, (33 U.S.C. §1362(14)), navigable waters (33 U.S.C. §1362(7)), the terms "willfully" and "negligently," and the meaning of intent and specific intent under the criminal law. So informed, the jury returned a verdict of guilty, finding that the defendants had willfully or negligently discharged pollutants from a point source into navigable waters without a permit. In fact, the evidence at trial showed that defendants never applied for a permit, a fact not contested by defendants' counsel. Furthermore, counsel for the defendants never suggested at trial, in post-trial motions or argument or on the initial appeal to the Third Circuit, that the defendants were in any way exempt from the permit requirements of 33 U.S.C. §1311(a) and 33 U.S.C. §1342.

Section 402 of the Water Pollution Act, 33 U.S.C. §1342, sets forth the permit system of the act (known as the National Pollutant Discharge Elimination System or NPDES). The statute provides, in relevant part,

> The Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that

> such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

33 U.S.C. §1342(a)(1).

Section 501 of the Act, 33 U.S.C. §1361(a) provides

> The Administrator [of the Environmental Protection Agency] is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter.

Pursuant to these grants of authority, the Administrator and the EPA promulgated regulations governing the issuance of permits allowing for some discharges of pollutants that would, in the absence of having been issued a permit, violate 33 U.S.C. §1311(a) and exempting some discharge activities from permit requirements. These regulations, at the time of the trial of the Frezzo Brothers, were codified at 40 C.F.R. §125.1, *et seq.* The issuance of a permit did not and does not give the permit-holder a "license to pollute." Rather, the permit is issued only after a hearing and is designed to limit the amount of pollution where, for technological reasons, some pollution is deemed unavoidable. All permits issued under the Water Pollution Act planned and provided for decreased pollution discharges in accordance with technology improvement and were designed to meet the Act's overall goal of ending discharges of pollutants into the Nation's waters by 1985. *See* 33 U.S.C. §1251; *E.I. duPont deNemours & Co. v. Train,* 430 U.S. 112, 116–24, 97 S.Ct. 965, 969–73, 51 L.Ed.2d 204 (1977); *Natural Resources Defense Council, Inc. v. Train,* 510 F.2d 692, 696–98 (D.C. Cir. 1974).

As heretofore noted, the regulations promulgated pursuant to 33 U.S.C. §1342 (Section 402 of the Act)

exempted some pollution discharge activities from the Act's permit requirement. Specifically, 40 C.R.F. §125.4 lists 8 areas of exclusions from the NPDES permit program. Section 125.4(i) provides that

The following do not require an NPDES permit:

> (i) Water pollution from agricultural and silvicultural activities, including runoff from orchards, cultivated crops, pastures, rangelands, and forest lands, except that this exclusion shall not apply to the following:
>
> (1) Discharges from concentrated animal feeding operations as defined in §125.51;
>
> (2) Discharges from aquatic animal production facilities;
>
> (3) Discharges from agricultural point sources as defined in §125.53; and
>
> (4) Discharges from silvicultural point sources as defined in §125.54.

At the time of the trial, 40 C.F.R. §125.53 read:

For the purpose of this section:

(1) The term "agricultural point source" means any discernible, confined and discrete conveyance from which any irrigation return flow is discharged into navigable waters.

(2) The term "irrigation return flow" means surface water, other than navigable waters, containing pollutants which result from the controlled application of water by any person to land used primarily for crops, forage growth, or nursery operations.

> COMMENT: This term includes water used for cranberry harvesting, rice crops, and other such controlled application of water to land for purposes of farm management.

(3) The term "surface water" means water that flows exclusively across the surface of the land from the point of application to the point of discharge.

It is the afore-quoted sections of the regulations upon which the petitioners based their Section 2255 motions. Petitioners contend that the mushroom composting business they conduct, which was the source of pollution discharged into a navigable stream, is an agricultural activity, in particular a non-point source agricultural activity, and that they therefore were not required by the EPA to have a permit to pollute the White Clay Creek adjoining their mushroom composting operation.[2] Therefore, reason the defendants, 33 U.S.C. §1311(a) and 1319(c) can not apply to them, and they therefore broke no law when polluting the creek.

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2. The regulations cited by the petitioners were promulgated by the EPA Administrator after notice of the proposed regulations and comment as provided for in Section 553 of the Administrative Procedure Act, 5 U.S.C. §553. *See* 38 Fed. Reg. 18,000 (1973); 41 Fed. Reg. 7963. Section 402 of the Water Pollution Control Act, 33 U.S.C. §1342(f) authorizes the Administrator to promulate such regulations. The regulations are thus "legislative" rules rather than "interpretative" rules. *See K. Davis, Administrative Law Treatise,* §7:8 (1979). The Third Circuit has observed that

> a 'legislative rule is the product of an exercise of delegated legislative power to make law through rules,' whereas an 'interpretative rule is any rule an agency issues without exercising delegated legislative power to make law through rules'. . . . [a]n interpretative rule is a 'statement' made by an agency to give guidance to its staff and affected parties as to how the agency intends to administer a statute or regulation. In contrast, a legislative rule, rather than merely setting forth an agency's own interpretation of the meaning of a statute and, in so doing, "creates" new law affecting individual rights and obligations.

*State of New Jersey v. Department of Health and Human Services,* 670 F.2d 1262, 1280-81 (3d Cir. 1981) (citations omitted). *See* also *Cerro Metal Products v. Marshall,* 620 F.2d 964, 981-82 (3d Cir. 1980); *Daughters of Miriam Center for the Aged v. Mathews,* 590 F.2d 1250, 1258-59 (3d. Cir. 1978). A validly promulgated legislative rule is subject to review under the "arbitrary and capricious" standard while an interpretative rule, though entitled to deference by a reviewing court, may be overturned if the court finds the agency's interpretation of the statute to be incorrect. *Cerro Metal Products, supra,* 620 F.2d at 981-82; *Joseph v. United States Civil Ser-*

The defendants' position plainly applies faulty logic. Pursuant to 33 U.S.C §1311(a), the Congress of the United States specifically made it a crime to discharge pollutants into a navigable stream without a permit. The defendants did not have a permit, and concede that they did not apply for a permit, nor did they contend at the trial that they were not required to have a permit. The jury found beyond a reasonable doubt that they willfully or negligently discharged pollutants into White Clay Creek without a permit. There was an abundance of evidence showing that the defendants violated the statute.

The petitioners contend that it is not fair under our system of criminal justice to hold them accountable for their violation of the statute on the basis of their post-trial interpretation of the above-quoted regulations. Since their conviction which was affirmed by the Third Circuit, 602 F.2d 1123 with certiorari denied by the Su-

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NOTE — *(Continued)*

*vice Commission*, 554 F.2d 1140, 1153-54 (D.C. Cir. 1977); *American Iron and Steel Institute v. EPA*, 526 F.2d 1027, 1047 (3d. Cir. 1975).

Both the legislative and interpretative regulations issued by EPA pursuant to the Act have been the subject of much involved litigation. *See, e.g., Americn Iron and Steel Institute, supra; E. I. DuPont de Nemours & Co. v. Train*, 541 F.2d 1018 (4th Cir. 1976), aff'd in part, reversed in part, 430 U.S. 112, 97 S.Ct. 965, 51 L.Ed.2d 204 (1977). Substantial portions of regulations similar to those invoked by the petitioners were invalidated in *Natural Resources Defense Council v. Train*, 568 F.2d 1369 (D.C. Cir. 1977), in which the Court held that "the EPA Administrator does not have authority to exempt categories of point sources [agricultural or otherwise] from the permit requirements of Section 402 [of the Act]" 568 F.2d at 1377. However, for the reasons set forth at pp. 719-725, *infra*, this Court need not decide whether the invalidity of the predecessor regulations precludes petitioners from invoking the regulations in effect during 1977 and 1978. As hereinafter set forth, the regulations, even if assumed to be valid, do not undermine defendants' convictions because they did not rely on the regulations and because the compost-making performed by the Frezzo Brothers was not an agricultural activity within the meaning of the regulations.

preme Court, 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756, their new counsel contends that §125.1 *et seq.* of the regulations exempted them from the permit requirements of 33 U.S.C. §1342, on the ground that they were engaged in an agricultural activity. For the reasons hereinafter set forth, the Court finds that this regulation did not exempt the defendants from the permit requirement because (1) by their own admission, the regulations were unknown to the petitioners until nearly one year after their trial and were never relied upon by the defendants when they made their decision to pollute the creek; (2) even if the defendants had relied upon the regulations, their reliance would have been unreasonable because (a) mushroom composting in the manner conducted by the defendants is not an "agricultural activity" within the meaning of 40 C.F.R. §125.4(i); and (b) even if the composting were an agricultural activity, the pollution discharged by the petitioners emanated from an agricultural point source as defined in 40 C.F.R. §125.53.

[5] The petitioners have never claimed that they relied on the regulations as exempting them from the statute. In fact, the evidence presented at the March hearing shows that the petitioners were not even aware of the regulations and that the regulations played no part in the Frezzo Brothers' decision to pollute the stream without a permit.

The absence of any reliance by the petitioners upon the regulations has been clear throughout the long history of this case. In denying defendants' first post-trial motions, this Court observed that the petitioners "acknowledge that they neither have a permit nor have they applied for one," 461 F.Supp. 266, 269 (E.D. Pa. 1978). This Court further noted

> Testimony was presented by several witnesses that on many occasions, commencing as far back as 1970, the defendants in this case had been investi-

> gated, visited and confronted by a number of state and county employees concerning the fact that the stream in question was being polluted by runoff from the compost operation conducted by the defendants on the Frezzo property.

461 F.Supp. at 270. In rendering decision on petitioners' Section 2255 petitions, this Court determined that

> review of the entire record in this case, however, reveals that the petitioners have never attempted to establish that they relied on these regulations in deciding not to apply for a permit. In fact, these regulations were never mentioned in the record until the petitioners filed a motion for a rehearing in the court of appeals after their original appeal had been decided adversely to them. Since the petitioners have not shown that they ever relied on these regulations, they cannot claim that the regulations would have led them to believe that their business activities were exempt from the permit requirements of the Act.

Memorandum of June 27, 1980 at 7, 491 F.Supp. at 1343, citing *United States v. United States Steel Corp.*, 482 F.2d 439 (7th Cir. 1973), *cert. denied*, 414 U.S. 909, 94 S.Ct. 229, 38 L.Ed.2d 147; *United States v. Pennsylvania Industrial Chemical Corporation*, 411 U.S. 655, 670, 93 S.Ct. 1804, 1814, 36 L.Ed.2d 567 (1973).

The evidence presented at the March, 1982 hearing makes it unmistakably clear that none of the petitioners knew of or relied upon these regulations in making their decision to discharge pollutants into the stream. Stipulated fact No. 25 of the pretrial order for the Section 2255 hearing states that the defendants had no knowledge of the regulations at issue prior to July 13, 1979 and that the petitioners were first aprised of the regulations after they obtained new counsel. This occurred after July 13, 1979, and well after the defendants were tried

and convicted by a jury and after this Court had denied their post-trial motions and had been affirmed in that denial by the Third Circuit.

Thus, the record has, at every juncture in this protracted litigation, clearly shown that the petitioners were never led by any regulation or statute to believe that the conduct for which they were convicted was not a at home. On the contrary, regulatory agencies during the 1970s suggested to the Frezzo Brothers that the government considered their conduct to be unlawful. In actuality, all the evidence shows that the defendants knew or should have known that the compost-producing practices were not shielded from the nation's anti-pollution laws.

Furthermore, the petitioners admit that they did not rely on the regulations in deciding not to apply for a permit. Under these circumstances, the petitioners cannot claim unfari surprise in their trial and conviction. The petitioners did not rely on a regulation thinking that it approved their conduct. Rather, the petitioners knowingly engaged in conduct that violated federal statutes, either because they were oblivious to the law or because they disregarded the law—not because they relied on a portion of the law. The failure of the petitioners to raise the issue as to their reliance on the regulations at the trial or on appeal underscores the fact that they did not rely on the regulations as insulating them from the clear meaning of the statute.

[6] Furthermore, the statute under which the petitioners were convicted, 33 U.S.C. §1311, is not the type of criminal statute which requires the govrnment to prove that the defendants specifically intended to violate the statute. To sustain a conviction under Section 1311, it is necessary only that the defendants acted willfully or negligently and that they intended to do the acts for which they were convicted. In order to convict, it is not necessary that the defendants intended to violate the

law. Thus, so long as the petitioners dumped pollutants into a navigable stream without a permit, their view as to the legality of their actions is irrelevant. The Supreme Court of the United States has repeatedly stated that

> The power of the legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned.

*Chicago, Burlington, & Quincy R. Co. v. United States*, 220 U.S. 559, 578, 31 S. Ct. 612, 617, 53 L.Ed.2d 582 (1910), citations omitted.

The Federal Water Pollution Control Act makes the petitioners' conduct malum prohibitum. It is, like the nation's pure food and drug laws,

> [A] now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good, it puts the burden of acting at hazard upon a person otherwise innocent but standng in responsible relation to a public danger.

*United States v. Dotterweich*, 320 U.S. 277, 280-81, 64 S.Ct. 134, 136-37, 88 L.Ed. 48, *reh. denied*, 320 U.S. 815, 64 S.Ct. 367, 88 L.Ed. 492 (1943). *See also Lambert v. California*, 355 U.S. 225, 228, 78 S.Ct. 240, 243, 2 L.Ed.2d 228 (1957), *reh. denied*, 355 U.S. 937, 78 S.Ct. 410, 2 L.Ed.2d 419 (1958) ("conduct alone without regard to the intent of the doer is often sufficient to convict defendant for violating malum prohibitum regulatory statute. There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and dilligence from its definition."); *United States v. Balint*, 258 U.S. 250, 252, 42 S.Ct. 301, 242, 66 L.Ed. 604 (1922) (criminal statutes need not recognize defenses founded on "good faith or ignorance.");

*Shevlin-Carpenter Company v. Minnesota*, 218 U.S. 57, 68-69, 30 S.Ct. 663, 666, 54 L.Ed. 930 (1909) (absence of specific intent as requisite element for conviction of crime does not offend due process; "innocence cannot be asserted of an action which violates existing law, and ignorance of the law will not excuse.").

Certainly, a criminal statute "must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation." *Boyce Motor Lines v. United States*, 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed. 367 (1952). Section 1311 of the Act meets this standard. In clear language, the statute informs all that pollution into navigable waters is forbidden unless the polluter has obtained a permit from the government. By its terms, the statute does not require that a defendant intend a criminal act in order to be convicted of a statutory violation. The Act requires only that the defendant have willfully or negligently committed the acts in question. Thus, the plain language of 33 U.S.C. §1311, indicates that it is the type of regulatory statute heretofore discussed. Case law interpreting the Act accords with that interpretation. *See United States v. Phelps Dodge Corp.*, 391 F.Supp. 1181, 1187-88 (D.Ariz 1975).

[7] However, the petitioners' convictions would remain valid even if they had relied upon the regulations. The language of the regulations and the evidence presented at the March, 1982 hearing makes it abundantly clear that the Frezzo Brothers mushroom composting operation is clearly not an "agricultural activity" within the meaning of 40 C.F.R.§ 125.4(i). Pursuant to the Third Circuits's remand of this case, 642 F.2d at 63, this Court held a hearing to determine the nature of the composting activities conducted by the defendants. The hearing took place on March 3, 4, 5, 11 and 12, 1982. Based on the evidence presented at that hearing and evi-

dence presented at trial or otherwise in the record of this case, the Court finds the following facts.

Frezzo Brothers, Inc. is a Pennsylvania corporation engaged in the creation and sale of mushroom compost and the growing of mushrooms near Avondale, Pennsylvania. The business is operated by Guido and James Frezzo serving as the principal corporate officers. The compost made by the defendants provides a growing medium for mushrooms. Defendants employ paid labor in both the growing of mushrooms and in the preparation of compost; different laborers are employed in these different functions. The Frezzo Brothers, Inc. fiscal year encompassing the acts of pollution discharge for which defendants were convicted began July 1, 1977 and ended June 30, 1978. During that period, Frezzo Brothers, Inc. had total income of more than 4.35 million dollars and a gross profit of more than 1.5 million dollars. During that year, approximately 90 percent of the defendants' compost production was sold to other mushroom growers. More than 90 percent of the corporation's gross income for that fiscal year was derived from the sale of compost, which the corporation produces in response to orders received from numerous mushroom growers.

Compost is produced by combining several raw ingredients, principally horse manure, but also including straw, corn cobs, cocoa shells, poultry manure and gypsum, mixing these ingredients with water, and then allowing them to ferment outside on concrete slabs known as "wharves." The Frezzo Brothers operation at the times in the indictment contained five acres of concrete wharf area and has since been expanded. All compost produced by the defendants is made with raw ingredients purchased from outside suppliers. At Frezzo Brothers, the aforementioned ingredients are combined on the concrete wharves in piles 6-8 feet high which measure up to 60 yards long. The piles may be wetted by rain, but are regularly watered by defendants whenever rainfall is

insufficient to wet the pile so as to maximize the fermenting process. The exact mixture of ingredients varies according to their availability and cost. These piles are frequently aerated by being mechanically turned as well as artificially wetted. The turning and wetting is essential to compost production and takes place every two-three days for between 10 and 15 days. These piles during this time generate their own biomass heat and this triggers a nitrogen conversion reaction which increases the nutritive content of the mixture and produces compost upon which mushrooms can be grown. The finished product of compost ranges in water content from 65 percent to 75 percent. The compost is then transferred to concrete huts or mushroom growing houses where it undergoes a pasteurization process to relieve it of microflora, and insects, worms, and ammonia that could impede mushroom growth. Each hut contains approximately 180 cubic yards of compost.

Pasteurized compost is then combined with mushroom spawn that eventually produces mushrooms. Each house contains about 8,000 cubic feet of space and has a slanted floor so that compost may be "slid" into the house through the upper door. The mushrooms grow in these dark houses.

The Frezzo Brothers wharf at the time of trial measured 5 acres in size. At that time, the facility also had a 114,000 gallon concrete holding tank designed to contain water run-off from the compost wharves and to recycle water back to them. The facility has also had a separate storm water run-off system that carried rain water through a pipe to a channel box located on an adjoining property owned by another mushroom grower. This channel box was connected by a pipe with an unnamed tributary of the East Branch of the White Clay Creek. The waters of the tributary flowed directly into the creek, which ultimately runs into the Delaware River. On each of the six dates charged in the indictment, run-off from the compost systems made its way

into the storm water run-off system and was permitted to be discharged into the creek. Samples of the runoff at these times contained pollutants that may not be discharged under the Act without a permit, which defendants lacked.

At the hearing on the Section 2255 petitions, defendants produced two expert witnesses in support of their contention that the making of mushroom compost is an agricultural activity, Drs. Paul Wuest and Leon Kneebone, both members of the faculty of Penn State University. The Government presented the testimony of Charles Rehm of the Pennsylvania Department of Environmental Resources, Richard Casson of the Environmental Protection Agency, Mark Stevens, an engineer, Dr. Harry Motto, a member of the Rutgers faculty, and Milo Peterson, an industrial classficiation expert employed by the federal government. Predictably, witnesses Wuest and Kneebone opined and gave testimony which suggested that compost-making is agricultural while witnesses Rehm, Casson, Stevens, Motto and Peterson opined and gave testimony which suggested that the process resembles manufacturing more than agriculture.

[8] The facts and insights given by these men on the stand were most helpful to the trier of fact but the final analysis of whether mushroom composting falls within the "agricultural activity" exclusion of 40 C.F.R. § 125.4(i) is ultimately a question of law which the Court must decide. Therefore, the Court has considered the facts and opinions elicited from each of these witnesses, but has not deferred to the viewpoint of any single witness as being determinative of the ultimate issue at the hearing. The Court has also examined the studied opinions of Judges Edward Becker and Louis Pollak in the cases of *Kaolin Mushroom Farms, Inc. v. United States*, 79-2 CCH Tax Cases (CCH) ¶ 9652, No. 77-4379 (E.D. Pa. 1979) and *Marshall v. Frezzo Brothers, Inc.*, No. 79-196 (E.D. Pa. June 12, 1981), *aff'd sub nom.*

*Donovan v. Frezzo Brothers, Inc.*, 678 F.2d 1166 (1982), respectively. Upon consideration of all this material, the Court finds that mushroom compost production as engaged in by Frezzo Brothers, Inc. at the times relevant to the indictment and conviction was not an "agricultural activity" within the meaning of 40 C.F.R. § 125.4(i).

The composting process at the Frezzo Brothers plant, examined as a whole, is remarkably similar to manufacturing. Raw materials are brought to the Frezzo facility from outside sources. For example, Frezzo Brothers purchases horse manure from farms located over a wide area. The ingredients are combined and placed on a concrete wharf. The ingredients are not merely lumped together on the wharf but are arranged in a regulated fashion into 6—8 feet high and 60-yard long piles. The piles are then mechanically turned and aerated at more or less regular intervals. Water is added to the piles in a controlled fashion so that the piles receive a regulated amount of moisture. The resulting compost is further processed through pasteurization and 90 percent of the product is then sold to other mushroom growers. Only 10 percent of the compost is used by Frezzo Brothers in their own mushroom houses. The compost so produced must be further processed by pasteurization before it is used as a growing medium for mushrooms. The Court finds that the mere fact that mushrooms are grown in or on the compost is not sufficient reason to label the process of compost-making on the scale conducted by the Frezzo Brothers "agriculture."

In examining the Frezzo Brothers operation to determine whether it met the "farm labor" exception to the wage and hours provision of the Fair Labor Standards Act, 29 U.S.C. § 203(f), 213, the Third Circuit, 678 F.2d 1166, affirming Judge Pollak's conclusion that the compost-operation of Frezzo Brothers (the very operation at issue in this case) was not "agriculture" within the meaning of the Act, said:

> [A]lthough mushroom growing is a type of farming, the production of mushroom compost is a preliminary activity which manufactures a product that is then used in farming . . .
>
> . . . . .
>
> [P]reparation of mushroom compost does not constitute the cultivation and tillage of the soil.
>
> . . . . .
>
> [A]s both parties agree, none of the ingredients of mushroom compost, which include manure, cocoa shells and hay, could accurately be termed soil. The end product, although in a very different form than the raw ingredients, is still not within the standard definition of soil. *See Black's Law Dictionary* 1563 (1968), *Webster's New Collegiate Dictionary*, 1105 (1976) . . . [w]here Congress leaves a statutory term undefined, that term should be given its ordinary and common sense meaning.

*Donovan v. Frezzo Brothers, supra,* at 1169-1170. The Court recognizes that in *Donovan* the issue was whether the composting operation of the Frezzo Brothers was agriculture within the definition set forth in Section 203(f) of the Fair Labor Standards Act. However, the analysis of the Third Circuit conforms to substantiate the analysis which this Court has made in determining that the Frezzo Brothers operation is not agriculture, but is a manufacturing type of operation.

This Court's determination accords with the conclusion of the Third Circuit in *Donovan v. Frezzo Brothers,* wherein the Court stated:

> We think that mushroom compost is more appropriately described as a commodity produced by an industrial process or technique rather than as an agricultural commodity. Mushroom composting involves the use of heat and moisture to biologically, physically and chemically alter the ingredients into

> a changed product—compost. Neither mushroom compost nor its ingredients, as we have seen, constitutes soil or a product of the soil. We find that the composting process is more akin to manufacturing than agriculture.

678 F.2d at 1171, *quoting Mitchell v. Budd,* 350 U.S. 473, 482, 76 S.Ct. 527, 532, 100 L.Ed. 565 (1955).

Like the Third Circuit and Judge Pollak, this Court attached significance to the fact that the Frezzo brothers sell 90 percent of the compost which they produce to mushroom farmers. Consequently, the Frezzo brothers are not operating a typical farm where the farmer "tills," "nurtures," and "cultivates" and "enriches" the soil on which he grows his crops. The defendants have contended that the involved composting process resembles soil tillage and that compost resembles soil in that it is the growing medium of mushrooms. Even if this reasoning were pursuasive, it would not make Frezzo Brothers an agricultural activity. A typical farmer does not cultivate soil and then sell 90 percent of it to other "farmers." The Court finds, therefore, that the Frezzo Brothers, in connection with their production of compost, are engaging in a manufacturing activity and not an agricultural operation.

The government urges this Court to adopt and employ the definitions of the Standard Industrial Classification Manual published by the U.S. Office of Management and Budget. However, the Court need not go this far. Rather, the Court has attempted to construe the term "agricultural activity" within the meaning of the regulation here at issue. Common understandings of the terms involved, when applied to this case, lead inexorably to the conclusion that the composting which takes place at Frezzo Brothers is not an agricultural activity for purposes of the regulations and the Water Pollution Control Act.

[9] This Court has determined that the composting operation of the Frezzo Brothers is manufacturing, not agriculture. However, even if this Court were to agree with the petitioners that the composting conducted by the Frezzo Brothers was agricultural activity, we would then be required to conclude that a permit would be neccesary because that pollution caused by the Frezzo Brothers emanated from an "agricultural point source" within the meaning of 40 C.F.R. §§ 125.53 and 125.4(i)(3). By its terms, section 125.4(i)(3) denies its exception to the permit requirement to "agricultural point sources" and Section 125.53 defines such sources as being "any discernible, confined and discrete conveyance from which any irrigation return flow is discharged into navigable waters." Section 125.53(a)(2) further defines irrigation return flow as "surface water, other than navigable waters, containing pollutants which result from the controlled application of water by any person to land used primarily for crops, forage growth, or nursery operations."

As heretofore noted, the composting operation at Frezzo Brothers uses water, in controlled application, to achieve the proper mixture for creating compost. Thus, in the event that this Court had adopted the defendant's analogy that the Frezzo Brothers operation was agricultural, such a determination would compel the conclusion that the water used for making the compost is irrigation within the meaning of the regulations, and that the water accumulated in the catch basin is "irrigation return flow," the surplus of which the Frezzo Brothers discharged through a pipe (a point source) into the stream, thereby polluting the stream. Thus, the polluted water was irrigation return flow within the meaning of 40 C.F.R. § 125.53(a)(2).

Without doubt, the sewer system of the Frezzo Brothers is a "discernible, confined and discrete conveyance" discharging the irrigation return flow. Appendix A of this memorandum, a photograph of a pipe from which

Frezzo Brothers discharge enters the creek, illustrates the concentrated nature of the source of the pollution that defendants discharged into White Clay Creek. One glance at the photograph reveals that the source of the pollution at issue in this case is not run-off in any way similar to rain water running downhill from croplands.

Furthermore, the regulations, read as a whole, clearly do not exempt from the act the concentrated and organized discharges of the type found at the Frezzo Brothers facility. The regulations sought to exempt from 33 U.S.C. § 1311 unconcentrated agricultural pollution such as rain water run-off containing fertilizer. However, during the course of the trial in this case, it became apparent that the pollution discharged by the Frezzo brothers was nothing like rain water run-off but was like sewage.

[10] In light of this Court's determination that the "agricultural activity" exclusion does not apply to petitioners, it cannot be said that they were ineffectively represented at trial by their former counsel who did not argue that the defendants were in any way exempt from the permit requirements of 33 U.S.C. § 1342. In order to establish a claim of ineffective assistance of counsel, the defendants must show that the performance of counsel fell below that "customary skill and knowledge which normally prevails" in this area and that they were prejudiced as a result of trial counsel's failure to raise the agricultural exclusion issue. *See United States v. Swinehart*, 617 F.2d 336, 340-41 (3d Cir. 1980); *United States v. Greene*, 510 F.Supp. 128, 131 (E.D. Pa. 1981); *United States v. Snead*, Cr. No. 76-502 (E.D. Pa. 1981). Petitioners have satisfied neither prong of this test.

Defendants also contend that they will be prejudiced if this Court finds that compost making is not an agricultural activity on the ground that this case was tried to the jury on the theory that the Frezzo Brothers operation produces agricultural waste. This Court has

reviewed the trial transcript and its instructions to the jury and has determined that defendants' contention is incorrect. The jury was charged that, in order to convict, they must find that: (1) the defendants discharged a pollutant; (2) the defendants' discharge of the pollutant was done willfully or negligently; (3) the defendants did not have a permit to discharge the pollutant. The Court instructed the jury as to the definition of "pollutant" found at 33 U.S.C. § 1362(6). This definition encompasses both agricultural and non-agricultural waste. Neither this Court nor the jury made any finding that the pollutants discharged by the defendants were specifically agricultural waste or any specific type of waste. The jury found only that the discharges of the defendants came within the statutory definition of pollutant.

Furthermore, any objection to either the jury instructions or the prosecution's closing argument should have been raised by the defendants at trial. This contention of the defendants falls clearly within the rule of *United States v. Frady*, ____ U.S. ____, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982) as it, like *Frady*, involves collateral attack upon the jury instructions and closing arguments. Therefore, the petitioners must show both cause for their failure to object to the charge to the jury or any prosecutorial characterization of their activities *and* prejudice resulting from the actions of the prosecutor or the Court. Again, petitioners have met neither prong of the *Frady* test.

While this Court has not discussed herein all of the contentions which were raised by defendants in their Section 2255 petitions, it has, however, reviewed the entire record and considered all the grounds alleged by the defendants in their petitions and finds that none of them either singly or collectively has sufficient substance to merit any further discussion as a basis for granting relief from their convictions or for vacating or setting aside their sentences. An appropriate order will be accordingly entered.

Gerald ALBERS, Plaintiff,
v.
Harol WHITLEY, et al., Defendants.
Civ. A. No. 81-517-PA.
United States District Court,
D. Oregon.
Aug. 31, 1982.

Civil rights action was brought against correction officers by prisoner who was shot during a riot in the state penitentiary. The District Court, Panner, J., held that use of shotguns by prison officers was justified after one inmate was reported dead, an inmate armed with a knife said that others were in danger and one guard was held hostage, precluding plaintiff from recovering on basis of use of excessive force, and (2) since there was no constitutional right to be free from use of deadly force administered to quell prison riot and rescue hostage, no reported cases established right of prisoner to recover damages for alleged consitutional violation and case authority at time clearly provided great discretion to prison officials to take necessary action to control prisoners, defendants could not have reasonably known their actions would violate plaintiff's constitutional rights and they were entitled to a qualified immunity.

Order accordingly.

**1. Federal Civil Procedure 2152**

Directed verdict is appropriate if evidence permits only one reasonable conclusion as to verdict.

**2. Federal Civil Procedure 2127, 2148, 2152**

On motion for directed verdict, court must consider all evidence, but must do so

## APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 82-1494

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UNITED STATES OF AMERICA
*v.*
FREZZO BROTHERS, INC., GUIDO FREZZO, and JAMES L. FREZZO,
*Appellants*

(D.C. Crim. No. 78-218)

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Argued Tuesday, March 8, 1983
Before: HIGGINBOTHAM, SLOVITER and
VAN DUSEN, *Circuit Judges*
(Filed March 29, 1983)

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### OPINION OF THE COURT

PER CURIAM:

In 1978, a jury convicted appellants of six counts of willfully and negligently discharging pollutants into waterways of the United States in violation of 33 U.S.C. §§1311(a) and 1319(c) (1978). *See United States v. Frezzo Bros., Inc.*, 461 F.Supp. 266 (E.D.Pa. 1978). This court affirmed the convictions. *United States v. Frezzo Bros., Inc.*, 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). The district court dismissed petitions for post-conviction relief, under 28 U.S.C. §2255, *United States v. Frezzo Bros., Inc.*, 491 F.Supp. 1339 (E.D.Pa. 1980), but this court reversed and remanded for

an evidentiary hearing to determine whether appellants' conduct was exempted from the criminal sanctions of 33 U.S.C. §§1311(a) and 1319(c) as agricultural activity under 40 C.F.R. §125.4(i) (1978). *United States v. Frezzo Bros., Inc.*, 642 F.2d 59 (3d Cir. 1981).

The district court found that petitioners' conduct was not agricultural activity; rather, the court found that petitioners' conduct was manufacturing in nature. *United States v. Frezzo Bros., Inc.*, 546 F.Supp. 713 (E.D.Pa. 1982). Consequently, it held that the pollution that resulted from petitioners' conduct was not exempted by 40 C.F.R. §125.4(i) from the criminal sanctions under which they were convicted, 33 U.S.C. §§1311(a) and 1319(c). It therefore denied petitioners' request for collateral relief. Petitioners now oppose the district court's decision.

After considering the contentions raised by appellants, to-wit, that (1) the district court erred in interpreting that (1) the district court erred in interpreting the Environmental Protection Agency's agricultural exclusion regulations, (2) the district court entirely ignored the evidence of record in determing that petitioner's mushroom composting operation was manufacturing rather than agriculture, (3) the government is estopped from arguing and the district court is estopped from finding that petitioners' mushroom composting operation is manufacturing, (4) that the definition of point source in the Water Pollution Control Act and EPA regulations constitute an unconstitutionally vague standard of criminal conduct, (5) petitioners were denied effective assistance of counsel, we will affirm the judgment of the district court.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

## APPENDIX G

Supreme Court of the United States
No. A-941
FREZZO BROTHERS, INC., ET AL.,
*Petitioners,*

*v.*

UNITED STATES

---

**ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI**

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Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 27, 1983.

/s/ William J. Brennan, Jr.

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Associate Justice of the Supreme
Court of the United States

**Exhibit "A"**

## APPENDIX H

Amendment V [1791]

"No person shall be . . . . deprived of life, liberty, or property, without due process of law . . . ."

## APPENDIX I

**§ 1311. Effluent limitations**

Illegality of pollutant discharges except in compliance with law

(a) Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

**§ 1319. Pollution Prevention**

(c)(1) Any person who willfully or negligently violates section 1311, 1312, 1316, 1317, or 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State or in a permit issued under section 1344 of this title by a State, shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,0000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(3) For the purposes of this subsection, the term "person" shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

## APPENDIX J

Section 125.4(i) states:
"The following do not require a NPDES permit:

(i) Water pollution from agricultural and silvacultural activities, including runoff from orchards, cultivated crops, pastures, range lands and forest lands except that this exclusion shall not apply to the following:

* * * *

(3) Discharges from Agricultural Point Sources as defined in Section 125.53."

No. 82-2136

# In the Supreme Court of the United States

OCTOBER TERM, 1983

FREZZO BROTHERS, INC., ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## TABLE OF AUTHORITIES

# In the Supreme Court of the United States

OCTOBER TERM, 1983

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*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that their trial counsel was incompetent because he failed to assert a defense that would have been unavailing.

1. Petitioners were convicted of willfully and negligently discharging pollutants into navigable waters of the United States without obtaining a permit, in violation of 33 U.S.C. (& Supp. V) 1311(a) and 1319(c).[1] The pollution resulted from petitioners' manufacturing of mushroom compost, a process that involves circulating water through a mixture of hay and horse manure. A concrete holding tank caught the water that ran off from the mixture and recycled it through the mixture. Nearby was an entirely separate storm water

[1]Petitioners Guido Frezzo and James L. Frezzo were each sentenced to 30 days' imprisonment and a fine of $25,000; petitioner Frezzo Brothers, Inc., was fined $50,000. Pet. App. A54.

runoff system that ultimately drained into navigable waters. As a result of both willful acts and negligence by petitioners, the holding tank overflowed on several different occasions and discharged pollutants into the storm water system and ultimately into the stream leading to navigable waters. See Pet. App. A19-A21, A28, A68-A70.

Petitioners' convictions were affirmed (Pet. App. A16-A30) and this Court denied certiorari (444 U.S. 1074 (1980)). Petitioners then moved to vacate their sentences under 28 U.S.C. (Supp. V) 2255. They claimed that their actions were not unlawful because a regulation, 40 C.F.R. 125.4(i) (1978), exempted them from the permit requirement. That regulation provided that water pollution "from agricultural * * * activities" does not require a permit, except if it is a "[d]ischarge[] from [an] agricultural point source[] * * *." See Pet. App. A60. Petitioners had not raised this claim at or before trial, and they did not raise it on direct appeal until they filed a rehearing petition in the court of appeals. In their Section 2255 motion, they also asserted that their trial counsel (who handled the appeal but not the rehearing petition) was incompetent for not having asserted this defense sooner.

The United States District Court for the Eastern District of Pennsylvania denied relief (Pet. App. A31-A37), but the court of appeals reversed and remanded for a hearing on the question whether petitioners' pollution was "agricultural" within the meaning of the regulation (*id.* at A47-A48).On remand, the district court again denied relief. *Id.* at A50-A76.

The district court first noted that, as evidenced by their failure to raise the claim at trial or on appeal, petitioners had not relied on the agricultural exemption when they discharged the pollutants and therefore could not claim that they were unfairly surprised. See Pet. App. A63-A65("[B]y

their own admission, the regulations were unknown to the petitioners until nearly one year after their trial and were never relied upon by the [petitioners] when they made their decision to pollute the creek * * * * *. On the contrary, regulatory agencies during the 1970s suggested to [petitioners] that the government considered their conduct to be unlawful.").

The district court then ruled that it was "abundantly clear that the Frezzo Brothers mushroom composting operation is clearly not an 'agricultural activity' within the meaning of 40 C.F.R. § 125.4(i)." Pet. App. A67. "Common understandings of the terms involved, when applied to this case, lead inexorably to the conclusion that the composting which takes place at Frezzo Brothers is not an agricultural activity for purposes of the regulations and the Water Pollution Control Act." *Id.* at A73. The court explained that this process involved combining and treating raw materials, and it drew an analogy to *Donovan* v. *Frezzo Bros., Inc.*, 678 F.2d 1166 (1982), in which the Third Circuit ruled that the same operation was not "agriculture" within the meaning of the Fair Labor Standards Act. Pet. App. A70-A73.

The district court also ruled that even if petitioners were engaged in "agricultural activities" within the meaning of the regulation, they would still not have been exempt from the permit requirement because the pollution emanated from an "agricultural point source." Pet. App. A74. The court then stated (*id.* at A75): "In light of this Court's determination that the 'agricultural activity' exclusion does not apply to petitioners, it cannot be said that they were ineffectively represented at trial by their former counsel * * *." The court of appeals summarily affirmed. *Id.* at A78-A79.

2. Petitioners' claim appears to be that competent counsel would have contended at trial that their activity was within the "agricultural activity" exemption; that this contention would have been submitted to the jury; and that the

jury might then have acquitted them. See Pet. 12. But petitioners do not take issue with the district court's determination that, correctly construed, the agricultural exemption does *not* apply to their activity. Thus, their claim amounts to a contention that their trial counsel must be held incompetent, and a new trial ordered, because counsel failed to raise a meritless claim.

This contention is plainly incorrect for several reasons. First, the facts about the nature of petitioners' composting operation were undisputed; the district court's ruling that petitioners' operation was not within the "agricultural activity" exemption was a conclusion of law based on those undisputed facts. Thus, even if trial counsel had requested a jury instruction relating to the agricultural activity defense, the district court could have refused to give such an instruction. See *United States* v. *Bailey*, 444 U.S. 394, 415-416 (1980).

Moreover, as we have explained at pages 12-18 of the Brief for the United States as Amicus Curiae in *Strickland* v. *Washington*, cert. granted, No. 82-1554 (June 6, 1983),[2] a showing of prejudice is an essential element of a claim of ineffective assistance of counsel. Since petitioners were not entitled to prevail on the claim that their activity was within the agricultural exemption, the only prejudice they can possibly allege is that somehow, through error or unauthorized jury lenity, the raising of this meritless claim at trial might have led to their acquittal. This Court has made it entirely clear that such speculation does not entitle a defendant to a new trial even when defense counsel's supposed failure was the government's fault. See *United States* v. *Agurs*, 427 U.S. 97, 108-109 (1976), citing *Brady* v. *Maryland*, 373 U.S. 83, 90-91 (1963). A fortiori, such

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[2]We have sent a copy of this brief to petitioners.

speculation does not entitle petitioners to relief, when the failure to raise the defense was the result of their own counsel's choice or omission.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

AUGUST 1983

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[3]Petitioners assert that the government argued at trial that their pollution was "agricultural" in nature and therefore cannot now contend otherwise. See Pet 9-11. But as the district court noted (Pet. App. A76), the "agricultural" nature of petitioners' activity was not in issue at the trial. In any event, since the "agricultural activity" exemption of 40 C.F.R. 125.4 (1978) was not raised at trial, any references to the agricultural nature of petitioners' activity are not material to the question presented by the petition.

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